In The

United States Court Of Appeals
For The Seventh Circuit

CONTEMPORARY CARS, INC. and AUTONATION, INC., SINGLE AND JOINT EMPLOYERS,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Intervening-Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

OPENING BRIEF OF PETITIONERS/CROSS-RESPONDENTS

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CIRCUIT RULE 26 1 DISCLOSURE STATEMENT

Appellate Court No: 14-3723

Short Caption: Contemporary Cars, Inc. v. National Labor Relations Board

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item 3):

AutoNation, Inc.

Contemporary Cars, Inc.

Mercedes-Benz of Orlando

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fisher & Phillips LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

AutoNation, Inc. is the parent corporation of Contemporary Cars, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AutoNation, Inc. owns 100% of the stock of Contemporary Cars, Inc.

Attorney's Signature: s/ Steven M. Bernstein Date: January 6 2015

Attorney's Printed Name: Steven M. Bernstein

Please indicate if you are *ounsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONTEMPORARY CARS, INC., d/b/a Mercedes-Benz of Orlando, and AUTONATION, INC., SINGLE AND JOINT EMPLOYERS,	)	
Petitioners,	)	
v.	)	
	)	No. 14-3723
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent,	)	

CERTIFICATE OF SERVICE

I certify that on January 6, 2015, I filed the attached pleading with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit, and served the same via U.S. mail, postage pre-paid, on the following parties:

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-3723

Short Caption: Contemporary Cars, Inc. v. National Labor Relations Board

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AutoNation, Inc. is the parent corporation of Contemporary Cars, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

AutoNation, Inc. owns 100% of the stock of Contemporary Cars, Inc.

Attorney's Signature: s/ Joel W. Rice Date: January 6 2015

Attorney's Printed Name: Joel W. Rice

Please indicate if you are *ounsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CONTEMPORARY CARS, INC., d/b/a Mercedes-Benz of Orlando, and AUTONATION, INC., SINGLE AND JOINT EMPLOYERS,	)	
Petitioners,	)	
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I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This matter is before the Court on a petition for review and cross-application for enforcement of a final order of the National Labor Relations Board ("the Board"), dated December 16, 2014 ("Order"). (A30-34). The Order affirmed a prior Decision and Order of the Board, dated September 28, 2012 (which had been vacated and remanded by this Court for further proceedings in light of the United States Supreme Court's decision in *N.L.R.B. v. Noel Canning*, 560 U.S. 674 (2014)). (A4-8, A30-34).

The Board had jurisdiction over the underlying proceedings pursuant to 29 U.S.C. § 160(a). This Court has jurisdiction over the Petition and Cross-Application pursuant to 29 U.S.C. § 160(e) and (f), as the Petitioner transacts business in this Circuit.

The petition for review was timely filed on December 17, 2014; the cross-application for enforcement was filed on February 2, 2015.

II. STATEMENT OF THE ISSUES

The Board's Order raises several issues on this appeal, as listed immediately below, but Issue Nos. 1-4 pertaining to the technician layoffs are of particularly acute concern and import, for two reasons: (1) the monetary impact of a backpay remedy and adverse consequences of ordering reinstatement of several technicians at this juncture; and (2) the Board's remedial order with respect to the Dealership's alleged

bargaining obligation over the spring 2009 layoffs directly conflicts with this Circuit's clear authority in *Sundstrand Heat Transfer, Inc. v. N.L.R.B.*, 538 F.2d 1257, 1259 (7th Cir. 1976).

1. Whether the Board's determination that the Dealership's layoff of Anthony Roberts in the fall of 2008 was motivated by anti-union animus is supported by substantial evidence and has a reasonable basis in law, where the evidence fully established that the underlying decision was based on Roberts' relative skill set, and where the only evidence suggesting that the decision-maker even knew of Roberts' alleged union sympathies derived from the testimony of a witness (James Weiss) who was otherwise thoroughly discredited by the Administrative Law Judge.

2. Whether the Board erred as a matter of law in concluding that the Dealership had a duty to bargain over the layoffs of four other employees in the spring of 2009, where the Board's ruling rejecting the Dealership's challenge to the Union's[1] representative status was void *ab initio* under *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010), and where the Board's renewed decision on August 23, 2010 expressly stated that the Union's representative status would be deemed to only run prospectively from the date of the renewed decision.

[1] The "Union" as referenced herein is the International Association of Machinists and Aerospace Workers, AFL-CIO.

3. Assuming, *arguendo*, that the Dealership was somehow operating under a duty to bargain as of the spring of 2009, whether the Board erred as a matter of law in rejecting the Dealership's argument that its conduct as set forth directly above was otherwise excused to the extent that it was motivated by compelling economic circumstances.

4. Whether the Board further abused its discretion in ordering a backpay remedy where there was no duty to bargain over the effects of the layoffs, given the compelling economic circumstances driving the layoff decisions, and where, in any event, such bargaining would not have operated to preserve the employment of the employees at issue in light of those circumstances.

5. Whether the Board erred as a matter of law in finding that the Dealership violated Section 8(a)(5) by failing to bargain over: (a) suspension of employee skill reviews in 2009; and (b) changes to the way that technicians were paid for performing certain warranty work; along with its alleged failure to respond to the Union's April 17, 2009 information request.

6. Whether the Board erred in reversing the ALJ and finding that the Dealership's non-disciplinary coaching of employee Dean Catalano for his intemperate outburst to a representative of the Orange County Health Department violated Section 8(a)(5) of the Act.

7. Whether the Board's findings of Section 8(a)(1) violations with respect to certain actions and statements undertaken by former Team Leader Andre Grobler, General Manager Bob Berryhill, and Assistant General Counsel Brian Davis, in the period leading up to and shortly after the election, were supported by substantial evidence and had a reasonable basis in law.

III. STATEMENT OF THE CASE

A. Statement Of The Case And Proceedings Below

This matter arises from a half-dozen unfair labor practice charges filed by the Union alleging that the Dealership violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (the "Act") in connection with certain actions undertaken during and after the Union's organizing campaign. (*See* ULP Charges (Case Nos. 12-CA-26126, 12-CA-26233, 12-CA-26306, 12-CA-026354, 12-CA-026552)). The Regional Director for Region 12 of the Board subsequently issued a consolidated complaint on March 31, 2010, and thereafter an amended one on June 8, 2010. (*See* Consolidated Complaint, Amendment to Consolidated Complaint). The Dealership answered by denying all material allegations. (*See* Answers to Amended Consolidated Complaint).

1. ALJ Carson's Ruling

On March 18, 2011, after a hearing conducted over several days in November and December of 2010, the Administrative Law Judge ("ALJ") issued a decision in

this matter. (A4-29). The ALJ's decision found in favor of the Dealership as to approximately 75% of the Complaint allegation paragraphs. (*Id.*)

Pertinent to this appeal, the ALJ found that the Dealership, by discharging employee Anthony Roberts in December 2008, violated Sections 8(a)(1) and (3) of the Act. (A27). The ALJ further found that the layoffs of four technicians in the spring of 2009, though not discriminatory in violation of Section 8(a)(3) of the Act, nevertheless constituted an unlawful refusal to bargain in violation of Section 8(a)(5), necessitating both reinstatement and backpay. (A22-23). The ALJ determined that the Dealership committed additional Section 8(a)(5) violations with respect to: (a) suspension of skill level reviews; (b) adjustments to reimbursement for certain warranty work; and (c) failing to provide the Union with requested information regarding unit employees. (A27).

In addition to the foregoing, the ALJ found Section 8(a)(1) violations with respect to certain statements attributed to former Team Leader Grobler, General Manager Berryhill, and Assistant General Counsel Davis, in the period leading up to and shortly after the December 16, 2008 election. (A27).

Both the Dealership and General Counsel filed Exceptions and Cross-Exceptions to the ALJ's decision. (*See* Respondent's and General Counsel's Exceptions to the ALJ's Decision and Order).[2]

2. First Board Decision and Order

On September 28, 2012, a three-member panel consisting of Board Members Hayes, Griffin and Block, issued a decision. (A4-8). The Board upheld the ALJ's findings with respect to the Section 8(a)(1) violations, except as to one of Team Leader Grobler's statements. (A4).[3] The Board likewise upheld the ALJ's finding that the Dealership had, in discharging Roberts, violated Section 8(a)(3) of the Act. (A4-5).

Further, the Board upheld the ALJ's findings as to Section 8(a)(5) violations, including, in particular, the finding as to the layoffs of four employees in April 2009. (A4).[4] Finally, the Board reversed the ALJ's dismissal of the allegation that the Dealership violated Section 8(a)(1) by issuing a documented coaching to employee

[2] References to Respondent's (Petitioner's) and General Counsel's Exceptions to the ALJ's Decision and Order shall be referred to herein, respectively, as "Resp. Except. Br., p _" and "GC Except. Br., p. _".

[3] The Board found it unnecessary to address the ALJ's Section 8(a)(1) finding that Davis solicited grievances and implicitly promised to remedy them, on the grounds that any such finding would be cumulative and would not affect the remedy. Member Hayes dissented as to the findings concerning Grobler and found it unnecessary to pass on whether either Davis or Berryhill violated Section 8(a)(1) by interrogating employees, as, in Hayes' view, such findings would be cumulative. (A4).

[4] On the ground that it would not materially affect the remedy, two of the panel Members found it unnecessary to pass on the ALJ's finding that the layoffs were not a violation of Section 8(a)(3). (A4). Member Hayes would adopt the ALJ's dismissal of the Section 8(a)(3) allegations as to the employee layoffs. (A4-5).

Dean Catalano for intemperate statements he directed at a representative of the Orange County Health Department. (A5). Two of the three panel members found it unnecessary to address whether the written coaching also violated Section 8(a)(3), as it would not affect the remedy. Member Hayes would have affirmed the ALJ's dismissal of the Section 8(a)(3) allegation as to Catalano. (*Id.*).

3. Motion for Reconsideration

On October 16, 2012, the Dealership moved for reconsideration of the Board's decision, particularly as to findings that the Dealership had bargaining obligations with respect to the four non-discriminatory layoffs that were implemented in the spring of 2009 due to compelling economic circumstances. (Respondent's Motion for Reconsideration of the Board's Decision and Order).

In its motion, the Dealership also asserted that the Board's decision was without legal authority, as Members Griffin and Block were serving unlawful "recess" appointments. (*Id.*). In an Order dated December 7, 2012, the Board denied the Dealership's motion. (*See* Board's Order Denying Respondent's Motion for Reconsideration).

4. Appeal of First Board Decision

On December 7, 2012, the Dealership filed a petition for review of the Board's September 28, 2012 decision, and, shortly thereafter, the Board cross-appealed for enforcement. (*See* Petition for Review, Appeal No. 12-37642, Document #1).

During the pendency of the appeal, the Dealership moved for, and obtained, a stay of briefing pending a decision from the United States Supreme Court in *Noel Canning v N.L.R.B.*, No. 12-1281, *cert. granted*, 81 U.S. L.W. 3629 (June 24, 2013), on the recess appointments issue. (*See* Order Granting Petitioner's Motion to Hold Briefing Schedule in Abeyance, Appeal No. 12-37642, Document #19).

On July 1, 2014, the Board moved to vacate its September 28, 2012 decision and remand for further proceedings in the wake of the Supreme Court's decision in *N.L.R.B. v. Noel Canning*, 560 U.S. 674 (2014), finding the recess appointments of Members Griffin and Block to be invalid. (*See* Motion to Vacate and Remand, Appeal No. 12-37642, Document #20). Thereafter, on October 3, 2014, this Court granted the Board's motion to vacate and remand, and ordered that mandate issue forthwith. (*See* Order Granting Motion to Vacate and Remand, Appeal No. 12-37642, Document #21).

5. Renewed Board Decision

On December 16, 2014, after remand, a newly constituted panel – consisting of Chairman Pearce and Members Johnson and Schiffer – affirmed the ALJ's findings and adopted the ALJ's order, for the reasons set forth in the Board's previous order of September 28, 2012 (358 NLRB No. 163), and order denying motion to reconsider, which were incorporated by reference (subject to minor modification, as reflected in footnote 1). (A30-34). The present renewed appeal followed.

B. Statement Of Facts

1. Background As To The Dealership And Service Technicians

Contemporary Cars, d/b/a Mercedes-Benz of Orlando ("the Dealership") is an automotive dealership located in Maitland, Florida. (Tr. 26, 130).[5] AutoNation, Inc. is a national corporation, established for the primary purpose of owning and operating automotive dealerships throughout the United States. (Tr. 53-54).

This case involves the Dealership's service department, which employed 37 technicians during the summer of 2008. (A9). The Dealership has three teams (green, gold and red) of service technicians, each of which has a team leader, who, in turn, reports to the service director. (A9, Tr. 336). The service technicians are compensated on a flat rate (flag system) basis, through which they are paid by the job (piece rate), rather than by the hour. (A9). Each job has an industry standard "book time" associated with it. (Tr. 333). If an insufficient number of vehicles is brought to the Dealership for service or repairs, some technicians will be idle and earn less money. (A9).

2. The Union Organizing Campaign And Election

In the summer of 2008, service technicians became disgruntled, and first began discussing the possibility of Union representation. (Tr. 312-313). In July of

[5] References to the transcript of the hearing held by the Administrative Law Judge, and General Counsel's and Respondents' (Petitioners') exhibits admitted into evidence shall be referred to herein, respectively, as "Tr. __", "GC Ex. __", and Resp. Ex. __".

2008, Union representatives David Porter and Javier Almaza initiated an organizing campaign among the service technicians, and, to that end, held a series of meetings with them. (Tr. 312-15). The organizing activity culminated in the filing of a representation petition on October 3, 2008. (Tr. 76, 312; GC Ex. 58).

The Dealership's General Manager, Clarence "Bob" Berryhill, became aware of the representation petition on or about October 5 or 6. (Tr. 137-38). Shortly after becoming aware of the petition, Berryhill reached out to AutoNation's Human Resources Manager, Roberta (Bobbie) Bonavia, for guidance. (Tr. 145). On October 9, Berryhill met with Bonavia and Vice-President and Assistant General Counsel Brian Davis to discuss how best to respond. (Tr. 960-62). Over the course of approximately the next two months, Berryhill, Davis, and Bonavia periodically met with employees to address questions, clarify issues or concerns, and provide additional information on the voting process. (Tr. 972-73).[6]

On December 16, 2008, after the Dealership's challenge to the underlying unit determination was denied by a two-member panel of the Board, an election was held to determine whether the service technicians wished to be represented by the Union. (A9-10, Tr. 28-29). The election resulted in a narrow vote in favor of representation. (Tr. 29). After the Board resolved the Dealership's various challenges on February

[6] The facts pertinent to specific statements and actions by Berryhill, Davis and others which are the subject of the Section 8(a)(1) findings are discussed separately in Section III.B.8, *infra*.

11, 2009, it certified the Union as authorized bargaining representative. (A10, Tr. 29; GC Exs. 61, 62 and 64). Over two months later, on April 17, 2009, the Union first contacted the Dealership for purposes of requesting bargaining. (A1).

3. Economic Downturn And Impact Upon the Service Department

In the summer of 2008, on a parallel path to the union organizing campaign, the Dealership was profoundly impacted by the severe financial crisis that affected so many sectors of the United States economy. (Tr. 1196, 1221; Resp. Exs. 31-37). The Great Recession of 2008 was unprecedented in the Dealership's experience. (Tr. 403, 621, 928-29, 1108-12, 1154, 1168, 1192, 1203, 1218, 1420-22). In response, AutoNation officials reached out to local dealerships to put them on notice that cost-savings efforts would need to be initiated. (Tr. 1429-30; GC Exs. 99, 105, 113; Resp. Ex. 48). Locally, Berryhill and Controller Collie Clark began analyzing sales, service and other financial indicators, including monthly Store Operating Reports ("SORs") in an effort to identify appropriate cost-savings measures. (Tr. 1211-13).

Initially, in the spring and summer of 2008, the economic collapse was felt as a slowdown on the sales side of the Dealership's operations. (Tr. 1421). By October 2008, however, the lag in sales led to a dramatic slowdown on the service side, reducing daily repair orders by 50%. (Tr. 1109-10, 1200-03). Over the weeks that

followed, monthly gross profits were sharply declining and the SOR had plummeted by almost 40%. (Tr. 1110, 1202-03, 1206, 1211).

Berryhill was reluctant to resort to layoffs as a first resort, and instead searched for alternative cost-saving options. (Tr. 1432, 1450). Among other measures, the Dealership changed its loaner car system, reduced overtime, froze hiring, negotiated lower interest rates and even suspended free coffee in the used car sales area. (Tr. 1193). None of these efforts was sufficient, however, and the Dealership was ultimately forced to look to staff reductions. Within the Dealership overall, employee head count dropped from 125 as of the summer of 2008, to 95 employees less than one year later. (Tr. 73).

4. December 2008 Layoffs Of Three Technicians, Including Anthony Roberts

By the fall of 2008, the work available for service technicians had declined to such an extent that they began leaving for other opportunities. (Tr. 419-20). Indeed, the need for layoffs was openly discussed and anticipated among technicians because there was not enough work to support them. (Tr. 1331-32). In November 2008, Berryhill concluded that the number of technicians would have to be reduced in order to preserve service opportunities for those who remained. (Tr. 1205-07, 1236-37, 1360, 1437).

Berryhill, in consultation with Service Manager Art Bullock, decided that three layoffs would be necessary. (Tr. 1206, 1437-38). Two layoffs – that of

alignment technician Ted Crossland and tire technician Ed Frias – resulted from a decision to close the "tire shop." (Tr. 165, 1334, 1437-38). On December 8, 2008, Roberts, a general technician, was the third individual chosen. (Tr. 1437-38).

The decision to select Roberts was the result of the following process: Berryhill discussed the issue with Bullock, who reviewed the relative skills and qualifications of all technicians assigned to the three teams in consultation with Team Leader Bruce Makin. (Tr. 163, 166). With input from Makin and Bullock, Berryhill ultimately made the decision to select Roberts. (Tr. 168-69).

The selection process focused exclusively on the relative skill sets of the technicians and their ability to handle electronic diagnostics. (Tr. 116). Roberts was selected because of his weak computer diagnostic skills in relation to those of his technician counterparts. (Tr. 116, 1334-36). Computer skills had become increasingly integral to completing repair service at the Dealership. (Tr. 401). Indeed, Roberts' 2007 evaluation referred to the need for improvement in this critical knowledge/skill area. (Tr. 925).

The Dealership did not use seniority as a selection criterion, as it was not deemed useful, and had not been used in the past. (A23, Tr. 1345). Nor were the "skill ratings" assigned to the technicians considered. (A23, Tr. 1441). Finally, hours worked was not considered, as hours alone do not present an accurate picture of a technician's value. (Tr. 1259).

During the summer of 2008, the Union held several off-site meetings attended by many of the technicians. Although Roberts apparently attended some of those meetings, he was not a vocal Union supporter. (Tr. 313, 358-59, 404, 886, 888). Roberts himself testified that he never discussed the Union in the presence of management, and that he never engaged in any conduct that could be considered "open" Union support. (Tr. 888, 927, 935, 1018). Berryhill, the decision-maker, testified that he did not know of Roberts' Union sentiments at the time of the layoffs. (Tr. 1443).[7] Conversely, several vocal pro-Union technicians were not selected for layoff. (A23).

5. The Layoff of Four Additional Technicians In April 2009.

Due to an ongoing national recession, the service department continued to suffer from weak financial performance through the early part of 2009. (A21-22). Berryhill again consulted with Bullock and Clark, and determined that four additional technician positions should be eliminated. (A22). The selection process was based upon an objective evaluation form put together by the leaders of the three teams. (*Id.*). All three team leaders provided input on the technicians, who received numerical ratings based upon that combined input. (A23).

[7] The only person to suggest that Roberts was perceived as a Union supporter was employee James Weiss. (Tr. 65). The ALJ's mistaken reliance upon the testimony of this otherwise completely discredited witness is addressed in Argument Section V.B.1, *infra*.

The team leaders were explicitly instructed not to take union sympathies into consideration. (*Id.*). The four lowest rated technicians – Cazorla, Puzon, Poppo and Persaud – were ultimately selected for layoff. (*Id.*). Berryhill made the decision based entirely on the ratings process, to which he deferred. (*Id.*). None of the openly pro-Union technicians was rated near the bottom. (*Id.*).

The ALJ's decision contains additional detail concerning the selection process for the April 2009 layoffs. (*Id.*). As the ALJ properly found, the four technicians laid off in April 2009 "would have been discharged even in the absence of their union activities," thereby validating the non-discriminatory nature of the selection process. (*Id.*).

6. The Board's Other Section 8(a)(5) Findings

Apart from the April 2009 layoffs, the Board also upheld the ALJ's Section 8(a)(5) findings as to a few other actions by the Dealership. (A4-5). The facts pertinent to the allegations as to: (a) suspension of skill reviews; and (b) correction of the flat rate payout for certain warranty work; are briefly as follows:

a. Suspension of Skill Reviews

Skill reviews had been conducted sporadically, if at all, in 2007 and 2008 – well before the onset of the Union organizing campaign. (Tr. 184-87, 504, 924). A skill review does not necessarily result in a rate increase for the technician. (*Id.*; A25-26). As of the first half of 2009, when skill reviews were allegedly suspended,

a wage freeze was in effect for all departments at the Dealership – not just the service department. (Tr. 1427). By late 2009, skill reviews were resumed for all technicians. (A25-26).

b. Correction of Flat Rate Payout for Warranty Services

For some time, Mercedes-Benz offered what are known as Flex A and Flex B service menus for its vehicles, in conjunction with the manufacturer's warranty. (A26; Tr. 372-73, 1121-22). These services are also included as part of the AutoNation Vehicle Care Program. (GC Ex. 155). After 10,000 miles, a customer received a menu of services referred to as Flex A. After the next 10,000 miles, the customer received a different menu of services referred to as Flex B. The technicians were paid a flat rate for these warranty services, regardless of how much time they took to perform them. (A26; Tr. 372-73, 1121-22; GC Ex. 155).

In late 2008 or early 2009, Finance Director Yvette Lookoff advised the Sales and Service Directors that the technicians were being paid the higher Mercedes-Benz warranty rates for Flex A and Flex B services, even though the Dealership was being reimbursed at the lower AutoNation rates for the same work. (Tr. 1122-24). The Dealership corrected this procedural discrepancy by changing the flat rate payment to the technicians so as to align it with the reimbursement rate under the AutoNation warranty program. (Tr. 1123; GC Ex. 155).

Because the AutoNation warranty program required fewer services for Flex A and B than the former Mercedes program, the lower flat rate was offset by the fact that less work was required of the technicians. (Tr. 1123). The rate for individual tasks within the Flex A and B menus remained the same. (Tr. 1123-25; GC Ex. 155).

7. The Documented Coaching Of Dean Catalano

Catalano was appointed a shop steward in February 2009. (A24). In September 2009, he observed a co-worker leaving the restroom without washing his hands. (*Id.*). Catalano and other employees were discussing their concerns when Sales Manager Maia Menendez overheard them. (*Id.*). Menendez responded by contacting the Orange County Health Department to request a presentation on general hygiene concerns, including the regular washing of hands. (*Id.*; Tr. 555; Resp. Ex. 11).

On October 2, a representative from the Health Department came to the Dealership and gave two identical presentations, both of which focused upon the H1N1 virus. (A24). Catalano attended the second presentation. (*Id.*). At the close of that presentation, the government representative asked if there were any questions. (*Id.*). Catalano raised his hand, and proceeded to berate the speaker, complaining that her presentation had not addressed his concerns. (A24, Tr. 1135). He further stated that this was "not the meeting we were looking to have." (A24).

The representative suggested that Catalano direct his concerns to management. (*Id.*). He responded that he had already done so, and "this is what" he got. (*Id.*). Catalano did not reference his shop steward status or the Union in any way in his comments to the representative. (Tr. 570, 74).

On October 13, 2009, the Dealership issued Catalano a documented coaching reminding him that he needed to conduct himself "in a manner that is courteous, respectful and polite to all associates, managers, customers, and guests of the dealership." (A24). The coaching states that it will not be part of Catalano's permanent record but will be retained in a local file by the service manager. (*Id.*). The employee whose lack of hand-washing led to Catalano's request also received a non-disciplinary coaching. (Resp. Ex. 47).

8. The Board's Section 8(a)(1) Determinations

The Board also affirmed certain ALJ findings of Section 8(a)(1) violations in the weeks preceding the representation election and over the months that followed.

a. No Solicitation Policy

The AutoNation Associate Handbook contains a provision prohibiting "solicitation by an associate of another associate while either of you is on company property." (A10-11). This particular allegation arises out of former employee James Weiss' circulation of an anti-union petition in the fall of 2008. (A10-11; Tr. 350, 667). At that time, Weiss left his work area and approached other technicians while

they were on working time, asking them to sign the petition. (*Id.*). One of those employees, Brad Meyer, complained to Berryhill, who, in turn, consulted with Assistant General Counsel Davis. (Tr. 351-52). Davis instructed Berryhill to explain to Weiss that he could no longer engage in this activity during working time, and that he would have to confine such efforts to his personal time. (Tr. 354-55, 669, 793, 1013-14).

There is no evidence that the Dealership enforced the no solicitation policy as written. The Weiss incident comprises the sum total of the evidence in support of the Section 8(a)(1) finding as to the handbook provision.

b. Team Leader Grobler's Interrogation of Employees In July/August 2008 And October-December 2008

Andre Grobler was, until December 8, 2008, team leader of the gold team of technicians. (A11). In late July 2008, as employee Juan Cazorla was preparing to leave work, Grobler asked him why he was "in such a rush," and then added, "Oh, I guess you got that meeting to go to." (*Id.*). The following month, Grobler commented to Cazorla, "you better rush, you have that meeting to go to." (*Id.*).

In the period from October through December 2008, Grobler is alleged to have asked employee Larry Puzon on a few occasions if he had attended a Union meeting. (Tr. 496-98). Puzon also claimed that Grobler asked him "right after the [December 16] election" how he voted. (Tr. 517-18). Grobler was, in fact, on administrative leave at the time of the latter alleged inquiry. (*Id.*). Puzon did not disclose whether

he had attended Union meetings or how he voted. (Tr. 497-98, 517-18). He also testified that neither Berryhill nor Davis knew of his position on the Union. (Tr. 519).

c. Berryhill's Alleged Solicitation of Grievances and Implied Promise to Remedy Them

Berryhill had a longstanding practice (preceding the representation petition) of engaging with employees to ferret out concerns, as part of his open-door policy. (Tr. 144, 182). In September 2008, Berryhill heard rumors of renewed Union organizing activity. (Tr. 1499-50). At Area Manager Pete DaVita's request, and consistent with his longstanding communication practice as General Manager, Berryhill met with a few of the employees individually to discuss their workplace concerns. (Tr. 1501, 1505-06).

Berryhill did not say that he would remedy the issues in the shop, but only thanked the employees for raising them. (Tr. 341, 431). There was no evidence of specific promises of enhanced benefits, or that grievances would be resolved in exchange for a rejection of the Union. (Resp. Excep. Br., p. 10).

d. Davis' Alleged Solicitation of Grievances and Interrogation of Employee Persaud

Davis, at the request of Berryhill and DeVita, first visited the Dealership on October 9, 2008. (Tr. 960). As head of AutoNation's Labor Relations program, Davis was responsible for coordinating employee education and communication

efforts in advance of an NLRB-administered election. Over the last three months of 2008, Davis visited the Dealership on several occasions to speak with managers, supervisors and employees. (Tr. 972-73).

Davis acknowledged that employees offered complaints and brought issues to his attention, but firmly denied that he promised to resolve them. (Tr. 88-89). In a meeting on either October 15 or 16, in response to employee complaints that management had been unresponsive to their complaints in the past, Davis responded that employees "could talk to him at any time…call him." (A14).

In early December, Davis was walking around talking to the technicians. When he came to Persaud, Davis allegedly asked him how he "felt about the election." (A15). Persaud responded: "I think that the Company is going to learn I think we have a good chance." (*Id.*). In response, Davis merely smiled and walked away. (*Id.*).

e. Berryhill and Davis Allegedly Informing Employees Their Grievances Had Been Adjusted By Demotions of Grobler and Manbuhal

The Dealership's technicians had been complaining about Team Leaders Grobler and Manbuhal for months—well before the onset of any Union activity. (Tr. 837). Complaints ranged from how they handled work assignments to favoritism to demeaning conduct. (Tr. 440-41). Berryhill testified that he personally made the decision to demote Grobler and Manbuhal based upon complaints leveled against

them over an extended period. (Tr. 1465-66). The Dealership had a long history of making changes to its Team Leaders for performance-related reasons, with at least one employee (Catalano) volunteering that he had been demoted from a Team Leader position "long before" the Union issue. (Tr. 536).

On December 9, Berryhill conducted a brief meeting in the shop to inform technicians of the changes. (Tr. 1466). Berryhill did not suggest that the changes were being made to encourage employee abandonment of the Union, or even in response to employee complaints. (Tr. 442, 1467). To the contrary, Berryhill specifically refrained from articulating the reasons for the decision, as it was none of the employees' concern. (Tr. 1467).

IV. SUMMARY OF ARGUMENT

This appeal concerns two main categories of errors committed by the Board: (1) those pertaining to the technician layoffs, including, in particular, the Board's patently erroneous backpay remedy as to the spring 2009 layoffs; and (2) those pertaining to the Dealership's failure to bargain over other, non-layoff related decisions, and its alleged Section 8(a)(1) violations in the context of the representation election. Although the Dealership urges reversal of all Board determinations adverse to it, the centerpiece of this appeal is the technician layoffs and the Board's remedial order directed at the spring 2009 layoffs.

A. Board Errors As To Technician Layoffs

The Board erred in determining that the Dealership violated Section 8(a)(3) of the Act by laying off Anthony Roberts, as that decision was unsupported by substantial evidence and contrary to applicable law. First, the Board's determination that anti-Union animus motivated the Dealership's decision with regard to Roberts rested tenuously upon the testimony of a single witness – James Weiss. Mr. Weiss' testimony had otherwise been thoroughly discredited, and his testimony on this particular issue was at odds with all other witnesses, including Roberts himself. Second, the Dealership introduced abundant evidence establishing a legitimate business reason for Roberts' selection – his lack of computer diagnostic skills – which was not shown to be pretextual. Rather, the ALJ and, in turn, the Board, impermissibly substituted their own business judgment for that of the Dealership.

The Board also erred as a matter of law in concluding that the Dealership had a duty to bargain over the layoffs of four technicians in the spring of 2009. These layoffs, which the Board agreed were economically justified, did not give rise to a duty to bargain because, as of the spring of 2009, there had been no valid ruling on the Dealership's Request for Review of the unit determination, and consequently the election ballots should have been impounded at that time.

The initial two-member Board ruling on the Dealership's Request for Review was vacated as a result of the United States Supreme Court decision in *New Process*

Steel, L.P. v. N.L.R.B., 560 U.S. 674 (2010), thereby rendering it void *ab initio*. Consequently, no bargaining obligation attached until the decision of a validly constituted Board panel on August 23, 2010 – well over a year after the layoffs of the four technicians. Furthermore, even if the Dealership had a duty to bargain in the spring of 2009, it was relieved of that obligation due to compelling economic considerations arising out of the nationwide financial crisis in 2008-09, and its attendant impact upon the automobile industry, in general, and the Dealership, in particular.

Even assuming *arguendo* that the Dealership had a duty to bargain with the Union over the spring 2009 layoffs, the Board committed an abuse of discretion in ordering the Dealership to reinstate the four technicians and provide them with full backpay. Based upon this Circuit's decision in *Sundstrand Heat Transfer, Inc. v. N.L.R.B.*, 538 F.2d 1257 (7th Cir. 1976), the Dealership had no duty to bargain over the effects of the layoffs, and a backpay remedy was improper where, in light of the admitted economic justification for the layoffs, bargaining would not have kept the technicians on the job or otherwise altered the Dealership's decision. Likewise, for the same reasons, reinstatement was clearly an inappropriate remedy. Any finding to the contrary would effectively repudiate the Court's decision in *Sundstrand*, if not reverse it altogether.

B. Other Erroneous Board Determinations

The Board's decision was likewise infected with error in the following respects: First, it erred in finding that the Dealership had a duty to bargain with the Union over certain other business decisions, including: (a) suspension of skill reviews in 2009; and (b) changes to the way in which technicians were paid for performing certain warranty work. Second, the Board erroneously reversed the ALJ's finding that Catalano's outburst at a meeting with the Orange County Health Department was not protected activity, and thus should have warranted a non-disciplinary coaching. Finally, the Board erred in affirming the ALJ's relatively few Section 8(a)(1) findings with respect to certain statements and actions by management in the period immediately preceding and after the December 16, 2008 representation election.

VI. ARGUMENT

A. Standard of Review

The Court must consider whether the Board's decision is "supported by substantial evidence and whether its legal conclusions have a reasonable basis in law." *L.S.F. Transp., Inc. v. N.L.R.B.*, 282 F.3d 972, 980 (7th Cir. 2002) (citing *Multi-Ad Servs., Inc. v. N.L.R.B.*, 255 F.3d 363, 370 (7th Cir. 2001)). In assessing the Board's decision, "merely cursory review is not adequate," for this Court "must take into account the entire record, 'including the evidence opposed to the Board's

view from which conflicting inferences reasonably could be drawn.'" *Chicago Tribune Co. v. N.L.R.B.*, 962 F.2d 712, 716 (7th Cir. 1992) (quoting *N.L.R.B. v. George Koch Sons*, 950 F.2d 1324, 1330 (7th Cir. 1991).

The Board's determination as to an appropriate remedy is reviewed for an abuse of discretion. *Sundstrand Heat Transfer, Inc. v. N.L.R.B.*, 538 F.2d 1257, 1260 (7th Cir. 1976).

B. The Board's Determination That The Dealership's Decision To Lay Off Anthony Roberts Violated Section 8(a)(3) Is Unsupported By The Evidence And Contrary To Law.

The Dealership's decision to lay off technician Anthony Roberts is governed by *N.L.R.B. v. Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the Board's General Counsel must first establish that Roberts' alleged Union sympathies were a "substantial or motivating factor" in the employer's decision to take adverse action against the employee. *Huck Store Fixture Co. v. N.L.R.B.*, 327 F.3d 528, 533 (7th Cir. 2003). Anti-union animus is established by showing that the employee was "engaged in union activit[y], that the employer knew of and harbored animus toward the union activit[y], and there was a causal connection between the animus and the implementation of the adverse employment action." *Id.* (citing *N.L.R.B. v. Clinton Electronics Corp.*, 284 F.3d 731, 738 (7th Cir. 2002)).

If the General Counsel meets its burden, the burden shifts to the employer to show that it would have taken the same action regardless of the employee's union activity. *Huck Store Fixture Co.*, 327 F.3d at 533. The General Counsel must then show either that the reason did not exist, or that the employer did not, in fact, rely on that reason.

1. The Board's Finding That Anti-Union Animus Motivated The Dealership's Decision To Lay Off Roberts Is Unsupported By Substantial, Credible Evidence.

The record is devoid of credible evidence that the Dealership was aware of Roberts' alleged pro-union sentiment, or that it suspected him of engaging in Union activity. To the contrary, apart from passively attending some meetings, Roberts engaged in no conduct that would have suggested he was a proponent of the Union. (Tr. 313). Roberts himself testified that he took care to avoid engaging in any conversations or conduct that could be construed as Union support. (Tr. 888, 927, 935, 1018). Berryhill, the decision-maker, testified that he did not even know where Roberts stood on the Union at the time of the layoff. (Tr. 1443).

The Board's determination to the contrary erroneously relied on the ALJ's singular and illogical reliance on the testimony of former employee James Weiss. (A23-24). Specifically, despite overwhelming evidence to the contrary, the ALJ (and, hence, the Board) relied on Weiss' testimony that he had informed Berryhill

and Davis that Roberts was one of the instigators of the organizing campaign (A20), and that Berryhill had referred to Roberts as a "troublemaker." (*Id.*).

Weiss' testimony does not square with that of the other witnesses – none of whom portray Roberts as a known Union proponent, let alone a key instigator of the organizing campaign. (Tr. 404, 1334-38). Contrary to the ALJ's suggestion (A20), Berryhill never admitted that he received a report from Weiss that Roberts was a Union supporter, or that Berryhill considered Roberts to be a "troublemaker." (Tr. 1484).

The Board chose not to disturb the ALJ's bafflingly selective reliance upon Weiss' uncorroborated testimony in this isolated context of Roberts' layoff. Elsewhere in the ALJ's decision, he repeatedly made clear that Weiss' testimony was not credible. In a section of the ALJ's decision entitled "Preliminary Observations and Credibility Considerations," he found that "Weiss' contradictory assertions of his motivation and admissions of untruthfulness belie any reliability in his self-serving testimony." (A10).

Elsewhere in the ALJ's decision, commenting upon Weiss' constructive discharge allegation (which was ultimately dismissed), the ALJ observed: "Weiss was not credible. He claims that his denial to a Board agent that he was solicited to circulate the anti-Union petition was a lie, as well as his denial regarding whether he

showed it to Davis." (A24). In another context, the ALJ went so far as to say that "the testimony of Weiss defies logic." (A15).

The Board erred in leaving the ALJ's illogical and baffling reliance on Weiss' testimony undisturbed. Without Weiss' testimony, the General Counsel is unable to even satisfy the threshold *Wright Line* finding of anti-union animus as a motivating factor.

In similar circumstances, the Board has rejected a trial examiner's finding of violations based on statements attributed to a manager by an "unreliable witness." *Henriksen, Inc.*, 191 NLRB 622, n. 3 (1971) (witness found incredible in other portions of the same conversation, declining to find violations for three other incidents to which the witness testified). *See also*, *Domsey Trading Corp.*, 351 NLRB 824, 836 n. 56 (2007) (Board may make independent evaluation of credibility determination where it is based on factors other than demeanor); *Peer Enterprises, Ltd.*, 218 NLRB 987, 987 (1975) (affirming decision of ALJ in rejecting violation based on uncorroborated testimony of witness found unreliable in other respects, where the testimony was either explicitly or implicitly contradicted). This Circuit, too, has reversed credibility determinations where they are not based upon witness demeanor, and where they are illogical or ignore documentary or other evidence. *Kadia v. Gonzales*, 501 F.3d 817, 820-22, 824 (7th Cir. 2007) (vacating Board of

Immigration Appeals decision where judge's credibility determinations were not reasonable in light of documentary evidence and totality of the circumstances).

2. The Board Erred As A Matter Of Law In Rejecting The Dealership's Argument That Roberts Would Have Been Terminated Anyway.

Because substantial record evidence unequivocally established that Roberts' selection for layoff had nothing to do with anti-Union animus, the inquiry should end there. Even assuming, *arguendo*, that the General Counsel satisfied the *prima facie* showing under *Wright Line*, however, the Dealership proffered abundant evidence that Roberts would have been selected for layoff regardless, based upon legitimate business considerations.

There can be no dispute that the national economic crisis in 2008 had a profound impact upon the Dealership's financial performance, as shown in the Statement of Facts. *See* Section III.B.3, *supra*. Indeed, the ALJ conceded that "[t]he national financial decline in 2008, resulting in bankruptcies and bailouts, had a profound impact upon automobile sales and service." (A21).

Against that backdrop, and as a last resort, Berryhill decided in November of 2008 that technician layoffs were necessary, as the service work had slowed to a crawl. Berryhill wanted to preserve as much work as possible for his best technicians—who are paid on a piece rate, and hence, earn less when the work slows. (Tr. 1205-07, 1236-37, 1360, 1437). Two technicians were laid off as a result of

closing the Dealership's tire shop. (Tr. 165, 1334, 1437-38). Berryhill decided that one more general technician should also be laid off. (Tr. 1206, 1437-38).

The Dealership utilized a neutral and legitimate process to select the third technician for layoff. Specifically, because Berryhill lacked the technical background to evaluate the technicians, he relied upon the Service Director, Bullock, and one of the Team Leaders, Bruce Makin. (Tr. 163, 166). Roberts was selected because, out of all the technicians, he had the least mastery of the computer diagnostic skills that were becoming increasingly important in the repair and servicing of Mercedes-Benz vehicles. (Tr. 116, 401, 1334-36).

Even Roberts conceded that the amount of time he had to spend on electronic diagnoses had jumped from 7% to 50% or more (Tr. 916), and that his last evaluation had identified this as an area in which he needed to improve. (Tr. 925). In sum, the Dealership's decision was focused upon the relative skill sets of the technicians, with an emphasis upon the technician's ability to handle the electronic tasks which were becoming increasingly central to their job duties. (Tr. 116, 1334-36).

Once the Dealership proffers a legitimate business reason, it is incumbent upon the General Counsel to establish that the proffered reason was pretextual. Pretext requires a finding that the employer's proffered explanation "did not exist or that the employer did not rely on that reason…" *Huck Store*, 327 F.3d at 532.

Here, no such finding was made. Rather, the ALJ and, in turn, the Board, simply substituted their own business judgment for that of the Dealership. Specifically, the ALJ's decision focused upon such criteria as seniority, booked hours, and skill ratings. (A21). Yet the Dealership chose to utilize a different and equally legitimate criterion—an assessment of the technicians' skill set, with a focus upon mastery of the computer diagnostic skills. That the ALJ and Board would have looked to different factors had they been running the Dealership is of no consequence. The Board is not to substitute its business judgment for that of the Dealership. *See N.L.R.B. v. Louis A. Weiss Mem. Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999).

The Board's own precedents are in accord. *See*, *e.g.*, *Pollock Electric*, 349 NLRB 708, 711-12 (2007) (rejecting judge's independent comparison of candidates in refusal to hire case; judge erred by rejecting employer's use of recent hands-on experience as primary criterion for promotion, and instead looking to other reflections of employees' skills); *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993) ("the Board does not substitute its own business judgment for that of the employer in evaluating whether conduct was unlawfully motivated").

In short, the Board failed to conclude that the reason for Roberts' selection either did not exist or was not, in fact, relied upon by the Dealership. Absent evidence to support such a finding, the Board should have concluded that the

Dealership satisfied its burden of showing that it would have chosen Roberts anyway. By substituting its business judgment for that of the Dealership, the Board erred as a matter of law.

C. The Board Erred As A Matter Of Law In Concluding That The Dealership Had A Duty To Bargain Over The Layoffs Of Four Technicians In The Spring Of 2009.

Due to the ongoing national recession and concomitant decline in financial performance of the Dealership, four additional technicians were laid off in April of 2009. (A21-22). The neutral business rationale for their selection is set forth in the Statement of Facts (Section III.B.5) and in the ALJ's decision below. The ALJ found that the four additional layoffs were not a violation of Section 8(a)(3) because the technicians "would have been discharged even in the absence of their union activities." (A23). The Board upheld this determination, with a panel majority finding it unnecessary to address the Section 8(a)(3) finding as it would not materially affect the remedy, while Member Johnson agreed outright with the ALJ's dismissal. (A30).

The sole issue raised by the April 2009 layoffs is whether the Dealership had a duty to bargain over them prior to implementing the decision. As demonstrated below, there was no such duty because: (a) the Dealership had no duty to bargain until August 23, 2010, when a validly-constituted quorum of the Board issued a decision resolving the Dealership's challenge to the unit, and expressly identified

August 23, 2010 as the operative date for purposes of Union recognition; and (b) the severe impact of the national recession on the Dealership's operations constituted "compelling economic circumstances" warranting unilateral action.

1. The Dealership's Duty To Bargain Did Not Arise Until August 23, 2010 – Over A Year After The April 2009 Layoffs.

The Section 8(a)(5) violation found by the ALJ, and affirmed by the Board, is premised on a misapprehension that the Dealership was somehow operating under a duty to bargain as of the spring of 2009, based on the results of the disputed election held on December 16, 2008. No bargaining obligation attached as of the spring of 2009, however, as the ballots should never have been opened in the first place. Absent the opening and tallying of the ballots, the Dealership would have gained no knowledge that the Union obtained majority support, so as to trigger a duty to bargain while challenges to the election remained pending. As shown below, this result follows from the Board's own Rules and Regulations, and fundamental precepts of law and logic.

Under Section 102.67(b) of the Board's Rules and Regulations that applied at the time of the election, where, as here, a Request for Review has been filed (A1), the scheduled election shall not be stayed. NLRB Rules and Regulations, Section 102.67(b). Of equal significance, however, is the following language:

> *Provided, however,* that if a pending request for review has not been ruled upon or has been granted, ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

Id. Hence, it is clear that if the Dealership's Request for Review had simply remained pending as of the spring of 2009, and not been ruled upon at all, then the ballots would not have been opened and tallied, and the Dealership would not have been placed on notice that the Union had secured presumptive majority support so as to impose a duty to bargain.

Here, the Dealership's Request for Review was ruled upon prior to the spring of 2009, but the ruling was made by a two-member Board that had no legal authority to act in the first place, and instead should have awaited the swearing in of additional members to achieve a valid quorum.

Under the United States Supreme Court's June 17, 2010 decision in *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010), all two-member Board decisions, including the decision here rejecting the Dealership's Request for Review, were invalidated, on the basis that the Board lacked statutory authority to act without a proper quorum. Therefore, the Board's December 15, 2008 decision rejecting the Dealership's Request for Review was void *ab initio*, and should be treated as a nullity as it pertains to the triggering of any bargaining obligation on the part of the Dealership. The Board did not issue a valid decision with respect to the Dealership's

Request for Review until August 23, 2010, when, in the wake of *New Process Steel*, a reconstituted three-member Board rejected the Dealership's challenges, and affirmed the results of the election. *Contemporary Cars, Inc.*, 355 NLRB 592, 592-93 (2010).

Thus, no bargaining obligation attached here until the Board's August 23, 2010 decision—nearly a year and a half after the spring 2009 layoffs. Until that August 23, 2010 decision, no ruling had issued on the Dealership's Request for Review (the Board's earlier, invalid ruling having been voided *ab initio*), and the election ballots should have remained impounded and unopened. The Dealership should not have been penalized due to the Board's own overreaching in presuming to act without statutory authority. Even the Board acknowledged the need to address this anomaly, as, in a footnote to its August 23, 2010 decision, it stated that it would "deem the Certification of Representative to have been issued as of the date of this decision" (as opposed to the date of the election). *Contemporary Cars, Inc.*, 355 NLRB at 593 n. 4.

The ALJ downplayed the significance of the Board's statement in footnote 4 to its decision, seizing upon the Board's reference to the amended certification date as applying to "future proceedings." (A25). In its September 28, 2012 decision, however, the Board did not even address this issue, other than to affirm the ALJ's determination. (A4-5). Later, in denying the Dealership's motion to reconsider, the

Board sided with the ALJ. (Board's Order Denying Respondent's Motion for Reconsideration, p. 2).[8]

At no point has the Board attempted to explain or elaborate as to why the revised certification date should apply only to "future proceedings," or even to explain what, in this context, "future proceedings" means. Indeed, this appeal arises out of a challenge to the ALJ's decision issued on March 28, 2011 – several months after the August 23, 2010 Board decision establishing the new certification date. Hence, even if the Board's attempt to distinguish between prior and future proceedings made any sense, which it does not, there is no basis for suggesting that this challenge to the ALJ's ruling fails to constitute a "future proceeding."

Wholly apart from the Board's own statement as to the effective date of certification, the bargaining obligation should be deemed to have commenced as of August 23, 2010, for all of the logical and structural reasons discussed above. Neither the ALJ nor the Board cites a single case in which a Section 8(a)(5) violation was found during the period between the date of the election and the release of totally impounded ballots. Because the ballots here should have remained completely impounded, the absence of such precedent is telling.

[8] The Board's December 16, 2014 decision merely reaffirmed its prior rulings on this point without further elaboration. (A30).

Conversely, the precedent cited by the ALJ is easily distinguishable. The rule announced in *Mike O'Connor Chevrolet-Buick-GMC Co., Inc.*, 209 NLRB 701, 703-04 (1974) *enf. denied*, 512 F.2d 684 (8th Cir. 1975) – that an employer's obligation to bargain before making changes commences on the date of election – applies only where the ballots have been opened and tallied, and where the employer is on notice that the Union has achieved a presumptive victory, even when the employer is challenging the election results or the validity of certain contested ballots. This "at its peril" rule, with respect to post-election changes to the terms and conditions of employment and during the pendency of challenges, has no application where the ballots have been impounded and no tally has been made.

The Board's position attempts to confer legitimacy upon its original, two-member decision that contravenes *New Process Steel*. To find the Dealership liable for actions taken while its Request for Review should have remained pending and ballots should have been impounded, is to give credence and legitimacy to the Board's invalid exercise of its powers, and undermines and subverts the Supreme Court's ruling. While it may be easier and more convenient for the Board to ignore the implications of *New Process Steel*, that does not make it right or lawful. The onus of the morass created by the Board's decision to act without statutory authority should fall upon the Board, and not on the Dealership.

2. The Board Erred As A Matter Of Law In Finding That The April 2009 Layoffs Were Not Motivated By Compelling Economic Considerations.

Even assuming, *arguendo*, that the Dealership was somehow operating under a duty to bargain in April of 2009, the Dealership was fully relieved of any such obligation in the presence of "compelling economic considerations." *Mike O'Connor Chevrolet*, 209 NLRB at 703.

As shown in the Statement of Facts, Section III.B.3, *supra*, the Dealership was confronted with an unprecedented downturn in late 2008/early 2009 due to ripple effects from a financial crisis that affected nearly every sector of the United States economy. The downturn had already forced three layoffs in December 2008. (Tr. 165, 1334, and 1437-38). But even those layoffs were not enough.

Monthly gross profits had fallen from an average of $466,000 per month in 2007 to an all-time low of $290,000 per month by January 2009. (Tr. 1204, 1232). The number of flat rate service hours had declined by over 40%. (Tr. 1242). Even the ALJ recognized that the "reduction-in-force in April 2009 was dictated by economic circumstances." (A22).

The unique circumstances here amount to the "compelling economic considerations" referenced in *Mike O'Connor Chevrolet*. The nature of this exception was elaborated upon in *Van Dorn Plastic Machinery Co.*, 286 NLRB 1233 (1987) ("*Van Dorn II*"), *enf'd*, 881 F.2d 302 (6th Cir. 1989). The ALJ in *Van Dorn*

II, affirmed by the Board and the Sixth Circuit, properly rejected the General Counsel's argument that there must be an "emergency in operations so compelling that a change . . . if not effected immediately, would have been catastrophic to the present, or future economic health" of the employer. *Id*. at 1240.

Instead, the ALJ held that the *Mike O'Connor Chevrolet* test requires that the action taken "rest on some business circumstances that are discernibly more demanding than calling for mere exercise of sound business judgment . . ." (*Id*. at 1245), but that this "encompass[es] something less than an imminent business collapse, or requiring a demonstrable jeopardy of same." *Id.* Here, the dire economic circumstances confronting the Dealership in the spring of 2009 fully satisfied the *Mike O'Connor Chevrolet* test, as clarified in *Van Dorn II*.

In rejecting the Dealership's argument, the ALJ's decision, affirmed by the Board, is contrary to the evidence and relies upon a completely distinguishable line of Board decisions. For example, the decision in *Uniserv*, 351 NLRB 1361, 1369 (2007), cited by the ALJ for a stricter "economic exigency" standard, relied upon a line of cases addressing changes made by the employer *during the middle of collective bargaining*. *See*, *e.g.*, *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enf'd*, 1994 U.S. App. LEXIS 917 (9th Cir. Jan. 10, 1994).

Where the parties are already in the midst of negotiations, the imposition of a higher standard for unilateral changes makes sense. Here, however, the parties were not in the midst of collective bargaining. In fact, the Union did not even request bargaining until two weeks *after* the April 2009 layoffs. (A1). Nor, contrary to the ALJ, must the compelling economic considerations be "unforeseeable." (A25), citing *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). The *Angelica Healthcare* decision relied upon *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), which was denied enforcement by the Sixth Circuit (736 F.2d 349 (1984)), and, on remand in *Van Dorn II* (discussed immediately above), failed to engraft a "foreseeability" standard.

In sum, the ALJ's rejection of the Dealership's argument for an exception to bargaining ignored the evidence and rested upon a distinguishable line of cases and another Board decision that was subsequently discredited. The Board's uncritical adoption of the ALJ's decision should not stand, as it is contrary to law and the substantial evidence of the compelling economic circumstances the Dealership faced at the time of the layoffs.

D. The Board Abused Its Discretion In Ordering Reinstatement And Backpay As A Remedy For The Dealership's Failure To Bargain Over The Spring 2009 Layoffs.

Even assuming, *arguendo*, that the Dealership had a duty to bargain with the Union over the April 2009 layoffs, the Board committed a clear-cut abuse of

discretion in its choice of remedy. Specifically, the Board affirmed the ALJ's order requiring reinstatement of the four affected technicians, along with full backpay through the date of reinstatement. (A4-6, A30-31).

The ALJ's finding (as upheld by the Board) flies in the face of controlling precedent emanating from this very Circuit. In *Sundstrand Heat Transfer, Inc. v N.L.R.B.*, 538 F.2d 1257, 1259 (7th Cir. 1976), this Circuit held that even if an employer is otherwise operating under a duty to notify the Union of planned layoffs and supply certain requested information, it is not obligated to bargain over the effects of any layoff that is compelled by economic necessity.

As the Court reasoned, "[i]t seems to us highly illogical to apply the 'at-its-peril' doctrine to failure to bargain, before certification, over the effects of a layoff which was compelled by economic necessity." *Id.* at 1259. Here, too, where the layoffs were undisputedly driven by urgent economic considerations, and where they were implemented over a year before the August 23, 2010 Certification date, the Dealership had no duty to bargain over the effects. Hence, the backpay remedy affirmed by the Board constitutes clear error that cannot stand.

Furthermore, in *Sundstrand*, this Circuit held that even if there were a duty to bargain over the effects of the layoff, a full backpay remedy would still be improper. 538 F.2d at 1260. The purpose of a backpay remedy is "to restore the situation to that which would have been obtained but for the illegal action." *Id.* As the Court in

Sundstrand further reasoned, a full backpay remedy "must have been predicated on the assumption that bargaining over the effects of the layoff *would have kept the employees on the job*." *Id.* (emphasis added). Given the strong economic impetus for the layoffs, noted the Court, this was "wholly improbable." *Id*.

As in *Sundstrand*, given the admitted strong economic justification for the layoffs here (A21-22), it would be beyond "wholly improbable" that any bargaining over the effects would have kept the four technicians on the job, particularly where the criteria utilized in conjunction with the selection process have already been deemed by the ALJ to be non-discriminatory. Hence, here, as in *Sundstrand*, the Board's award of full backpay to the four technicians was a clear-cut abuse of discretion, as it does more than simply restore the status quo, but rather amounts to a windfall for the affected employees. *Id.*

The Board also abused its discretion in ordering reinstatement of the four technicians. (A4-6, A30-31). *See Colonial Corp. of America*, 171 NLRB 1553, 1555 n. 5 (1968), *enf. denied*, 427 F.2d 302 (6th Cir. 1970) (in ordering reinstatement for employees terminated for discriminatory reasons, the Board noted that employees "who would have been terminated for *nondiscriminatory* reasons would, of course, not be entitled to reinstatement") (emphasis added). The ALJ here expressly found, and the Board agreed, that the April 2009 layoffs were nondiscriminatory, as they would have occurred "even in the absence of their Union

activities." (A23). Accordingly, the proper remedy for any Section 8(a)(5) violation should not include reinstatement either. *Cf. Odebrecht Contrs. Inc.*, 324 NLRB 396, 396 n. 2 (1997) (where an economic layoff obligated the respondent to bargain over the effects of the layoff, the Board held that the ALJ erred in ordering reinstatement).

Tellingly, the General Counsel failed to distinguish or even address this Circuit's *Sundstrand* decision in his briefing to the Board, and the Board's affirmance of the ALJ makes no mention of *Sundstrand*. (A4-5, A30-31). There is no way to square the remedy in this case with this Court's holding in *Sundstrand*, and hence the remedy should be set aside.

E. The Board Erred In Finding That The Dealership Had A Duty To Bargain Over Certain Other Dealership Actions and Decisions.

The Board also upheld the ALJ's determination that the Dealership had committed Section 8(a)(5) violations by failing to bargain over: (a) suspension of skill reviews in 2009; and (b) changes to the way in which technicians were paid for performing certain warranty work. The Board also found that the Dealership committed a Section 8(a)(5) violation by failing to respond to the Union's April 17, 2009 information request. (A1, 27, 30).

The Board's Section 8(a)(5) findings are contrary to law for the reasons already demonstrated in Section III.B.5, *supra*, with respect to the spring 2009 layoffs of the four technicians: Specifically, the Dealership was under no obligation

to bargain with the Union until a validly constituted Board panel issued its decision on August 23, 2010.

Even if the Dealership was somehow operating under a duty to bargain over certain business decisions in 2009, the Dealership did not, in any event, violate Section 8(a)(5) for the additional reasons discussed below.

1. The Dealership's Alleged Failure To Conduct Performance Appraisals For Technicians Between July And October 2009 Did Not Violate Section 8(a)(5) Of The Act.

The Board's affirmance of the ALJ's finding with respect to alleged suspension of performance reviews was not supported by substantial evidence. Numerous witnesses testified that 2009 was not an anomaly, and that skill reviews were only conducted sporadically in prior years, if at all. (Tr. 184-87, 504, 924). Hence, the absence of skill reviews in the first half of 2009 is not attributable to the Union. The ALJ cites to a September 2007 memorandum from Service Director Bullock to the technicians promising reviews twice a year (A25), but the evidence is undisputed that this did not take place as promised – well before the Dealership had any inkling of an organizing campaign.

In addition, there is no evidence that any technician was impacted by a suspension of performance reviews in 2009. Throughout the relevant time period, and due to the economic conditions, a wage freeze was in effect for all departments at the Dealership. (Tr. 1427). The ALJ strains to find a potential adverse impact by

speculating that a review could have placed a technician on early notice of deficiencies, or could have laid the foundation for a future promotion. (A26). This is too slender a reed on which to base a Section 8(a)(5) violation. The Board should have reversed the ALJ, and its failure to do so was contrary to substantial evidence and an error of law.

2. The Dealership's Correction Of The Flat Rate Payout For Certain Warranty Work Did Not Violate Section 8(a)(5) Of The Act.

This alleged Section 8(a)(5) violation arises out of the Dealership's correction of a discrepancy relative to payment for certain services performed by the technicians under warranty. After 10,000 miles, a customer received a menu of services referred to as Flex A. After the next 10,000 miles, the customer received a different menu of services referred to as Flex B. The technicians were paid a flat rate for these warranty services, regardless of how much time it took to perform them. (A26; Tr. 372-73, 1121-22; GC Ex. 155).

In late 2008 or early 2009, Finance Director Yvette Lookhoff informed Service Director Bullock and Sales Manager Menendez that the technicians were still being paid at the higher, historical Mercedes-Benz warranty rates (the Mercedes-Benz warranty program having been previously discontinued), rather than at the lower AutoNation warranty rates for which the Dealership received reimbursement from Mercedes. (A26; Tr. 1122-23).

The Dealership corrected this discrepancy by adjusting the flat rate payment to technicians to align it with the reimbursement rate under the AutoNation warranty program for Flex A and Flex B services. (A26; Tr. 1123). Because the AutoNation warranty program actually required fewer services for Flex A and B, the lower flat rate was offset by the fact that less work was required of the technicians. (Tr. 1123).

The rate for individual tasks within the Flex A and B menus remained the same, but the number of tasks to be completed was reduced consistent with the more limited AutoNation warranty. (Tr. 1123-25; GC Ex. 155). There was no evidence to suggest that this isolated, technical correction to warranty rates was motivated by anti-union animus, or that it was an appropriate topic for bargaining. (Tr. 1123-25.)

The Board erred in affirming the ALJ's misguided finding on this point. First, the rate change was *de minimis* and designed to rectify a discrepancy that should not have existed in the first place. Second, the net effect of the rate change was, at most, neutral as to the technicians' pay. Although the flat rate payment for Flex A and B services was reduced, the total services to be performed under the AutoNation version of these warranties were fewer.

Hence, the technicians' time was freed up to perform other services at standard rates. There was no evidence that any given technician's pay was changed by this technical correction so as to require the Dealership to bargain over it. The

Board's affirmance, therefore, was contrary to applicable law and the substantial evidence in the record.

F. The Board Erred In Reversing The ALJ And Finding That The Non-Disciplinary Coaching Of Catalano Violated Section 8(a)(1) Of The Act.

The Board erroneously reversed the ALJ's finding that employee Dean Catalano's outburst toward the representative of the Orange County Health Department was not protected concerted activity. (A5). The Board's reversal constituted error in two respects: *First*, Catalano's comments were not protected activity. *Second*, the rude and discourteous manner in which Catalano conveyed his complaint removes it from the protection of the Act.

Catalano's conduct was not protected by the Act. It occurred at an educational meeting, conducted by a representative of the Orange County Health Department, and convened at Catalano's personal request to discuss hygiene-related issues—such as washing of hands after using the bathroom. (Tr. 555; R. Ex. 11). When the third-party presenter asked if there were any questions, Catalano raised his hand. He then proceeded to berate the speaker, insisting that the presentation was not what *he* (as opposed to the group) had personally asked for, as the speaker had, according to Catalano, not covered hand-washing techniques to his liking. (Tr. 1135). When the representative suggested that Catalano direct his concerns to management, he curtly replied, "I did, and this is what I got." (*Id.).*

As the ALJ correctly noted, the person from the Health Department to whom Catalano directed his remarks was a public employee and a guest of the Dealership. (A25). Further, as the ALJ also correctly noted, Catalano at no point stated that he was speaking as a shop steward, or on behalf of his fellow employees. (*Id.*; Tr. 574). The Health Department representative was in no position to address issues pertaining to the Dealership. Nor did Catalano convey anything other than his personal disappointment with the content of the speaker's presentation—rather than the notion that he was raising any health or safety-related concerns.

The Board's determination to the contrary is based solely on its conclusion that the comments arose out of a concern for sanitary restroom habits, which are an employment term and condition. (A5). The Board's selective focus ignores the factual context. The Dealership had no problem with Catalano raising a concern over bathroom hygiene. Indeed, Sales Manager Menendez invited the Health Department to address the employees on the subject of hygiene. (Tr. 555; R. Ex. 11). Catalano's protected activity was rewarded, not punished. His comments to the presenter, who was not a member of management, did not address or invoke employee concerns over hygiene; rather, they were an expression of personal pique. There was no mention by Catalano of health, safety, or hygienic concerns in his intemperate comments to the Health Department.

Furthermore, even if the substance of Catalano's comments to the presenter was otherwise protected activity, which it was not, his remarks lost any protection under the Act due to the intemperate manner in which they were made. The coaching form issued by the Dealership focused upon the fact that Catalano's "behavior was perceived [by several in attendance] as being rude, antagonistic and persistent towards the guest speaker." (GC Ex. 93). Indeed, according to Sales Manager Menendez, Catalano's demeanor was so "rude, belligerent and disrespectful," that she felt the need to personally apologize to the speaker thereafter. (Tr. 1135). Numerous others in attendance perceived Catalano's outburst in the same manner. (Tr. 1144, 1146).

It is well-established that the mere "fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity." *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003) (quoting *N.L.R.B. v. City Disposal Systems*, 465 U.S. 837 (1984)). In *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), the Board applied a four-factor test in assessing whether an employee can lose the protection of the Act by the offensive nature of the conduct at issue. Specifically, whether the conduct crosses the line depends on a careful balancing of the following: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.*

Here, Catalano's conduct crossed the *Atlantic Steel* line. First, the place of the conduct militates against protection because it occurred before a large group of other employees and a guest of the Dealership. *See Starbucks Coffee Co.*, 354 NLRB 876, 878 (2009) ("the public nature of the misconduct . . . in plain view of employees" militates against a finding of protection). Second, the subject matter was not, as the Board erroneously concluded, health concerns, but rather Catalano's criticism of the Health Department representative's speech. Third, Catalano's tirade to a guest of the Dealership was both rude and intemperate. Fourth, and finally, Catalano's comments were completely unprovoked and uncalled for. Hence, for this reason, too, the Board's determination should be reversed.

G. The Board Erred In Affirming The ALJ's Section 8(a)(1) Findings As To The Dealership's Conduct In The Period Immediately Preceding And After The Election.

The Board likewise erred in affirming the ALJ's relatively few findings of Section 8(a)(1) violations by the Dealership. As previously noted (Section III.A.1, *supra*), the ALJ dismissed approximately 75% of the Complaint allegations against the Dealership. Nonetheless, the Board erred in affirming his findings with respect to a number of alleged violations, including those set forth below.

1. The Board's Expansive Nationwide Remedy With Respect To The Dealership Handbook's No Solicitation Policy Is Unsupported By Substantial Evidence And Violates AutoNation's Due Process Rights.

The Board affirmed the ALJ's finding that the Dealership's no-solicitation rule violated Section 8(a)(1) because it was overly broad on its face. (A4, A11). The Dealership does not dispute that the handbook language is facially overbroad, but there is likewise no dispute that the language has not been enforced as written. To the contrary, the only instance of enforcement pertained to employee Weiss, who was simply told to confine his solicitation efforts to his personal time. (Tr. 354-55, 669, 793, 1013-14; see also GC Ex. 95, Section 8). In that instance, even the ALJ concedes that the enforcement was completely lawful. (A11). In the absence of even a single incident of unlawful enforcement of the no-solicitation policy, the Board's expansive remedy compelling a posting at all AutoNation facilities is overreaching and must be overturned. (A6-8). There is no evidence of even a technical violation at any other AutoNation facilities, let alone evidence of any instance of unlawful enforcement. This alone raises due process concerns. *See, e.g.*, *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984) (the Board's "remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices") (emphasis in original) (citation omitted).

The mere fact that AutoNation and MBO stipulated, for the limited purpose of these proceedings, that they would be deemed a joint/single employer, does not mean the two entities occupy that status for any other purpose. Nor does it give the Board power to issue a sweeping nationwide remedy under these circumstances.

2. The Board Erred In Affirming The ALJ's Finding Of Section 8(a)(1) Violations As To Questioning Of Employees By Former Team Leader Grobler.

The Board erred in affirming the ALJ's determination that Team Leader Grobler's brief interactions with two employees created an impression of unlawful surveillance. (A4,[9] A11, A30) There was no evidence that Grobler's interactions with employee Juan Cazorla in the late summer of 2008, or with employee Larry Puzon later that year, had the effect of coercing or restraining either employee in the exercise of his Section 7 rights. First, the impact of Grobler's alleged comments and questions to the two employees was *de minimis*, and would not cause any reasonable person to feel restrained or coerced, or to believe that the Dealership was conducting surveillance. *The Register Guard*, 344 NLRB 1142, 1144 (2005) (no violation unless employees would "reasonably assume" their activities were under surveillance). Second, there is no evidence that Grobler's interactions were passed on or connected to anyone in upper management, or that either employee in question

[9] In the Board's since vacated September 28, 2012 decision, Member Hayes dissented as to the Grobler findings. In Hayes' view, while Grobler indicated his awareness of the employee's union sympathies, he did not imply that he gained this knowledge through surveillance of employees' union activities. (A4 n. 4.)

believed this to be the case. Indeed, employee Puzon did not disclose anything in response to Grobler's questions about his activities or sympathies, and conceded that neither Berryhill nor Davis knew of his position on the Union. (Tr. 497-98, 517-18, 519).[10]

In sum, Grobler's few comments and interactions do not rise to the level of a Section 8(a)(1) violation, and the Board's conclusion to the contrary is unsupported by substantial evidence and is contrary to law.

3. The Board Erred In Affirming The ALJ's Section 8(a)(1) Finding Arising Out Of Berryhill's Meetings With Employees On Or About September 25, 2008.

The Board's affirmance of the ALJ's Section 8(a)(1) findings as to General Manager Berryhill's meetings with employees on September 25, 2008 was unsupported by substantial evidence and contrary to law. First, Berryhill's actions were entirely lawful, as they were consistent with past practice. Second, there is no evidence that Berryhill, in his questioning of employees that day, promised to remedy any grievances.

Berryhill's questioning of employees on September 25 about their concerns was entirely consistent with his practices preceding the onset of union organizing activity. As the ALJ noted, and the record reflects, Berryhill was often out in the

[10] Puzon's testimony that Grobler questioned him "right after the [December 16] election" is also highly suspect given that Grobler was out on administrative leave at the time. (Tr. 517-18.)

shop speaking individually with employees about their concerns. (A23; Tr. 144, 1482). Moreover, by the fall of 2008, rumors of organizing activity had persisted at the Dealership for over a decade. (Tr. 138, 1499). Berryhill's reaction to the renewed rumors was no different than on numerous prior occasions—acting to identify employee concerns in his role as General Manager.

The Board has long held that an employer with a past policy and practice of soliciting grievances may continue such a practice during an organizing campaign without drawing any inference that the solicitations are an implicit promise to remedy the grievances. *Wal-Mart Stores, Inc.*, 339 NLRB 1187, 1188 (2003). Contrary to the ALJ's determination, Berryhill's meetings with a few employees on September 25 were not so different in kind from his past practice as to give rise to an inference of unlawful solicitation of grievances.

Even if Berryhill's September 25 meetings did constitute a departure from past practices, they still would not have amounted to a Section 8(a)(1) violation, as Berryhill did not expressly or impliedly promise to remedy anything. As the Board has stated, "it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances . . . that is unlawful." *Uarco, Inc.*, 216 NLRB 1, 2 (1974).

Here, Berryhill's statements to employees on September 25 amounted to nothing more than an acknowledgment of their concerns and a non-committal promise to look into the issues raised. (Tr. 341, 431; A11-12). Consequently, this is no different from the scenario presented in *Airport 2000 Concessions, LLC*, 346 NLRB 958 (2006). In *Airport 2000 Concessions*, the Board found that a manager did not impliedly promise to remedy an employee's concerns about healthcare benefits where the manager made the conditional statement that "maybe the Respondent could provide better benefits later." *Id.* at 960. The Board held that the manager in that case "did not expressly promise to remedy the employee['s] complaint[ ], and the response[ ] he gave . . . [was] sufficient . . . to rebut any implication of a promise." *Id*. Berryhill's statements in the instant case were, at best, equivocal, and certainly did not constitute promises to remedy grievances so as to discourage union membership.

4. The Board Erred In Affirming The ALJ's Section 8(a)(1) Findings As To Assistant General Counsel Davis.

The Board affirmed the following findings of Section 8(a)(1) violations on the part of Assistant General Counsel Davis: (1) On October 17, 2008, Davis solicited grievances and impliedly promised to remedy them; and (2) In December 2008, Davis coercively interrogated employee Persaud. (A4-5, A14-15, A30). The Board's affirmance in both respects was unsupported by substantial evidence and contrary to law.

The first finding as to Davis arises out of a meeting he attended on October 15 or 16, 2008. Interestingly, the ALJ conceded that, with reference to this same meeting, there was no credible evidence in support of the Complaint that Davis had told employees it would be futile to elect the Union. (A14). Based solely on Davis' assurance at that same meeting that employees "could talk to him at any time," however, the ALJ found that Davis had solicited grievances and impliedly promised to remedy them. *Id.* Davis' vague and general statement, without more, is *de minimis,* and insufficient to warrant a Section 8(a)(1) violation for soliciting grievances and impliedly promising to remedy them. *See Metz Metallurgical Corp.*, 270 NLRB 889 (1984) (interrogation was *de minimis* where it did not interfere with election).

The second finding relates to an alleged interaction between Davis and employee John Persaud. According to the Complaint, Davis is alleged to have asked Persaud how he felt about the upcoming election. (A15). Persaud supposedly responded: "I think that the Company is going to learn I think we have a good chance," to which Davis merely "smiled and walked away." *Id.*

This brief interaction should not have resulted in a finding of coercive interrogation. First, Davis credibly denied engaging in any interrogation of unit employees, on that or any other date. (Tr. 1029, 1053). The ALJ did not discredit that denial—and, indeed, as to 32 of the 35 Complaint allegations involving Davis

had routinely credited him. (A10-A20). Instead, the ALJ reached the strained conclusion that Davis did not specifically deny the conversation with Persaud, even though Davis had categorically denied having any such conversations with anyone. (A15).

Second, it is obvious from Persaud's response that, had Davis asked Persaud that single innocuous question, it would not have been coercive. Persaud simply volunteered a pro-Union statement, to which Davis offered no further response. Nothing in the evidence relied upon by the ALJ, and affirmed by the Board, remotely suggests that this interaction—even if it took place—amounted to coercive interrogation in violation of Section 8(a)(1).

5. The Board Erred In Affirming The ALJ's Section 8(a)(1) Findings As To Comments By Berryhill And Davis Concerning The Demotions Of Team Leaders Grobler And Manbuhal.

The Board also erred in affirming the ALJ's finding that Berryhill and Davis violated Section 8(a)(1) by announcing the demotion of Team Leaders Grobler and Manbuhal at a meeting in early December 2008. (A4, A30). That finding was unsupported by the record as a whole, as discussed herein.

At the outset, no one has ever contended, and neither the ALJ nor the Board has found, that the demotions of Grobler and Manbuhal were somehow unlawful. Indeed, even the ALJ conceded that Berryhill had received multiple complaints over a period of time about the two of them concerning numerous aspects of their

leadership abilities. (A16; Tr. 440-41, 837). Nor did the ALJ find that either Berryhill or Davis stated that the decision to demote Grobler and Manbuhal had anything to do with the Union, or with dissuading unit employees from supporting the Union.[11]

Rather, Berryhill's announcement was merely a truthful statement that he was addressing employee concerns that predated any hint of Union organizing activity, and that were unquestionably within Berryhill's managerial prerogative to address. *See, generally, Parker-Robb Chevrolet*, 262 NLRB 402 (1982), *enf'd sub. nom. Automobile Salesmen's Union Local 1905 v. N.L.R.B.*, 711 F.2d 383 (D.C. Cir. 1983) (the Act imposes few limitations on employer's rights with respect to selection and treatment of supervisors).

Once Berryhill made the unquestionably lawful decision to demote the Team Leaders, he had little choice but to convey that decision to their subordinates, or risk leaving them guessing as to what had transpired. At a minimum, the employees needed to know of their new reporting responsibilities. It would have been irresponsible of Berryhill not to inform the employees of what was going on, and likely would have engendered more confusion and speculation.

[11] The ALJ specifically discredited witness Weiss' testimony that Davis referred to "buying votes." (A16).

Berryhill made the announcement at a brief meeting in the shop, unconnected to the Union campaign. (Tr. 1466). The ALJ's erroneous determination, when taken to its logical extreme, would effectively preclude management from saying anything about its lawful personnel decisions in response to unsolicited grievances pre-dating union organizing activity. Because the evidence as a whole clearly shows that Berryhill's announcement was not made "in order to induce employees to abandon their support for the Union," the Board's affirmance to the contrary should be reversed.

VI. CONCLUSION

The Board's Order was rife with numerous errors – all of which should be reversed. Of overriding concern to the Dealership, however, are the Board's errors in finding that the layoff of Roberts was discriminatory, and that the layoffs in the spring of 2009, though not discriminatory, imposed a bargaining obligation. Moreover, as to the latter layoffs, the Board's refusal to even acknowledge this Circuit's holding in *Sundstrand* relative to appropriate remedies warrants particular scrutiny by the Court. For all the foregoing reasons, the Court should grant the Dealership's Petition and deny the Cross-Application for enforcement.

VII. REQUEST FOR ORAL ARGUMENT

The Dealership respectfully requests oral argument in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)
Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   this brief contains 13,831 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   this brief has been prepared using Microsoft Word in 14 Point Times New Roman.

Respectfully submitted this 16th day of March, 2014

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 30(d)

I hereby certify that all documents required by Local Rules 30(a) and (b) are included in the Short Appendix attached hereto.

Respectfully submitted this 16th day of March, 2015.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on this the 16th day of March, 2015, the foregoing Brief of Petitioners with Short Appendix was filed, via the Court's CM/ECF System, which will send notice of such filing to all registered users.

The necessary filing and service were performed in accordance with instructions given to me by counsel in this case.

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Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Case 12–CA–26377

August 28, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on June 12, 2009, the General Counsel issued the complaint on June 25, 2009, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 12–RC–9344. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On July 13, 2009, the General Counsel filed a Motion for Summary Judgment. On July 15, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

Ruling on Motion for Summary Judgment[1]

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of the unit determination.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[2] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation, with an office and place of business located at 810 North Orlando Avenue, Maitland, Florida, has been engaged in the sales, leasing, and service of new and preowned vehicles.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000, and purchased and received at its Maitland, Florida facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Association of Machinists and Aerospace Workers, AFL–CIO, is

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[2] The Respondent's answer denies complaint par. 5(a), which sets forth the appropriate unit, and alleges as an affirmative defense that the unit is inappropriate. The unit issue, however, was litigated in the underlying representation proceeding. (In his Decision and Direction of Election, the Regional Director found the petitioned-for unit to be appropriate, and on December 15, 2008, the Board denied the Respondent's Request for Review.) Further, the Respondent's answer denies complaint par. 6, which alleges that by letter dated April 17, 2009, the Union requested that the Respondent recognize and bargain with it. The Respondent's answer avers that the Union's letter did not explicitly request that the Respondent recognize and bargain with it. However, in the Respondent's June 4, 2009 letter in response to the Union, the Respondent specifically acknowledged that the Union had requested bargaining and information for bargaining. Moreover, it is well settled that "a request for relevant information constitutes a request for bargaining." *Richmond, Div. of Pak-Well*, 206 NLRB 260, 261 (1973), citing *Rod-Ric Corp.*, 171 NLRB 922, enfd. 428 F.2d 948 (5th Cir. 1970), cert denied 401 U.S. 937 (1971). Accordingly, the Respondent's denials do not raise any litigable issues in this proceeding.

The Respondent also contends as an affirmative defense that the Board's December 15, 2008 Order denying the Respondent's Request for Review is illegitimate and carries no weight, because the two-member panel that issued the Order lacked the authority to do so. This defense is without merit for the reasons set forth in fn. 1.

a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on December 16, 2008, the Union was certified on February 11, 2009, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Mercedes-Benz service technicians, employed by the Employer at its facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated April 17, 2009, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. By letter dated June 4, 2009, the Respondent advised the Union that it was refusing to recognize and bargain with the Union.[3] We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since about June 4, 2009, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Maitland, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Mercedes-Benz service technicians, employed by the Employer at its facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Maitland, Florida, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

[3] Although the complaint does not refer to the Respondent's June 4, 2009 letter refusing to bargain with the Union, the letter is attached to the General Counsel's Motion as Exh. U.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and former employees employed by the Respondent at any time since June 4, 2009.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 28, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Mercedes-Benz service technicians, employed by us at our facility located at 810 North Orlando Avenue, Maitland, Florida, *excluding*: all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO

Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando[1] ***and*** **Autonation, Inc. Single and Joint Employers** ***and*** **International Association of Machinists and Aerospace Workers, AFL–CIO.** Cases 12–CA-026126, 12-CA-026233, 12–CA–026354, 12–CA–026306, 12–CA–026386, and 12–CA–026552

September 28, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On March 18, 2011, Administrative Law Judge George Carson II issued the attached decision. The Respondents filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondents filed a reply brief. The Acting General Counsel filed cross-exceptions and a supporting brief, the Respondents filed an answering brief, and the Acting General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge, for the reasons he states, that the Respondents committed numerous violations of Section 8(a)(1) and (5) of the Act during the Union's campaign to organize the service technicians at the Respondents' car dealership and continuing after the Union's certification as the employees' bargaining representative.[4] We also affirm the judge's finding, for the reasons

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[1] The name of the Respondent has been corrected. The judge mistakenly referred to it as Mercedes-Benz of Orlando, Inc.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order and substitute a new notice to conform to the Board's standard remedies for the violations found. For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

In affirming the judge's finding that the Respondents violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation rule, we agree with the Acting General Counsel that, because the handbook containing the unlawful rule was in effect at all of the Respondents' locations nationwide, the judge erred in failing to order the Respondents to post the remedial notice to employees at all its facilities. As the Board stated in *Guardsmark, LLC*, 344 NLRB 809 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007), "we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." Id. at 812. Accordingly, the Respondents shall be required to post the attached notice marked "Appendix A" at their Maitland, Florida facility, and to post the notice marked "Appendix B" at all of AutoNation's other facilities.

[4] We agree with the judge that the Respondents, through team leader Andre Grobler, violated Sec. 8(a)(1) by creating the impression that employees' union activities were under surveillance when he asked an employee why he was in such a rush and then stated that he guessed the employee was going to "that meeting," implying that he knew that the employee was, in fact, going to a union meeting. We find it unnecessary to pass on whether another statement by Grobler to the same employee on a subsequent occasion also created the impression of surveillance, as such a finding would be cumulative and would not materially affect the remedy. Member Hayes disagrees with his colleagues and the judge that Grobler created an unlawful impression of surveillance. In his view, while Grobler indicated his awareness of the employee's union sentiments, he did not imply that he gained this knowledge through surveillance of employees' union activities.

We find it unnecessary to pass on the judge's finding that the Respondents, through Vice President and Assistant General Counsel Brian Davis, violated Sec. 8(a)(1) by soliciting grievances from employees and impliedly promising to remedy them, as any such finding would be cumulative of other violations found and would not materially affect the remedy.

Member Hayes joins his colleagues in adopting the judge's finding that the Respondents, through General Manager Bob Berryhill, violated Sec. 8(a)(1) by soliciting grievances from employees and impliedly promising to remedy them. In doing so, he relies solely on the facts that Berryhill met with the employees individually in his office; the meetings occurred immediately after Berryhill learned of the organizing campaign; Berryhill said he would look into an employee's concerns; and that Berryhill's solicitation of grievances occurred in the context of other unfair labor practices. Member Hayes further agrees with his colleagues and the judge that the Respondents, through Berryhill, violated Sec. 8(a)(1) by informing employees that their grievances had been adjusted by the demotion of the team leaders. In doing so, he emphasizes that he does not find the demotions themselves to be unlawful. Member Hayes finds it unnecessary to pass on whether the Respondents, through Davis and Berryhill, violated Sec. 8(a)(1) by interrogating employees regarding their union activities. In his view, those findings are cumulative and do not affect the remedy.

There are no exceptions to the judge's finding that the Respondents violated Sec. 8(a)(1) by informing employees that the Respondents would not recognize the Union until there was a contract.

In adopting the judge's finding that that the Respondents violated Sec. 8(a)(5) by unilaterally laying off service technicians Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud in April 2009, we find it unnecessary to pass on the judge's dismissal of the allegation that the employees' layoffs also violated Sec. 8(a)(3), as finding the additional violation would not materially affect the remedy. Member Hayes would adopt the judge's dismissal of this allegation for the reasons stated by the judge.

Member Hayes agrees with his colleagues that, under *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), the Respondent unlawfully failed to bargain over the layoffs of the service technicians, among other postelection unilateral changes. He notes that the Re-

set forth in his decision, that the Respondents violated Section 8(a)(3) by discharging employee Anthony Roberts because of his union activities. However, for the reasons that follow, we reverse the judge's dismissal of the allegation that the Respondents violated Section 8(a)(3) and (1) of the Act by issuing a documented coaching to employee Dean Catalano because of his union and protected concerted activities.[5]

The relevant facts are fully set forth in the judge's decision. Briefly, in September 2009, Catalano observed another employee leaving the restroom without washing his hands. Catalano, who was then the shop steward, discussed the incident with other employees. He later spoke to Sales Manager Maia Menendez about the matter. Menendez contacted the Orange County Health Department to address employees' hygiene concerns. In October 2009, a Health Department representative came to the dealership and gave a presentation, which centered on the H1N1 virus. At the end of the meeting, Catalano complained to the representative that she had not addressed the problem at the dealership with employees failing to wash their hands after using the bathroom. Catalano stated that this was "not the meeting we were looking to have." He was subsequently issued a documented coaching, indicating that he needed to conduct himself "in a manner that is courteous, respectful and polite to all associates, managers, customers, and guests of the dealership."

The judge dismissed the allegation, reasoning that Catalano's conduct was not protected because the representative of the Orange County Health Department was a public employee who was a guest of the dealership and was unaware of the issue that had led to her invitation to speak to the Respondents' employees. The judge further reasoned that Catalano did not say that he was speaking as a shop steward.

Contrary to the judge, Catalano's remarks were protected because they related to employees' concern about a work condition. It is irrelevant that Catalano's comments were not directed to a management official who was aware of employees' concern; what is relevant is that his comments furthered employees' protected concerted activity addressing sanitary restroom habits, an employment term and condition. We find that the Respondents violated Section 8(a)(1) by issuing Catalano a documented coaching, which would tend to inhibit Catalano from engaging in protected concerted activities and could be construed as a threat of future reprisal. See *Lancaster Fairfield Community Hospital*, 311 NLRB 401 (1993) (employer violated Section 8(a)(1) by issuing a conference report to an employee for complaining about various employment conditions as the report would restrict the employee's protected right to criticize management).[6]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1 in the judge's decision.

"1. The Respondents, by maintaining an unlawfully broad rule prohibiting all solicitation on company property, by creating the impression that employees' union activities were under surveillance, by coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies, by soliciting employee grievances and implying that they would be remedied in order to dissuade them from supporting the Union, by informing employees that their grievances with regard to team leaders had been adjusted by the demotion of the team leaders in order to dissuade them from supporting the Union, by informing employees that the Respondents would not recognize the Union until there was a contract, and by issuing an employee a documented coaching because of his protected concerted activities, violated Section 8(a)(1) and Section 2(6) and (7) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondents, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Maitland, Florida, its officers, agents, successors, and assigns, and AutoNation, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

spondent unpersuasively argues that the "at risk" doctrine of that case should not apply under the factual circumstances of this case, but does not directly seek to overrule or modify this doctrine. Accordingly, although Member Hayes expresses no view as to whether *Mike O'Connor Chevrolet* was correctly decided, he agrees to apply it here for institutional reasons.

[5] We agree with and adopt the judge's dismissal, based on his credibility determinations, of the allegation that the Respondents violated Sec. 8(a)(1) by threatening employees with discharge if they engaged in union activities. We find it unnecessary to pass on the judge's dismissal of the allegation that the Respondents unlawfully interrogated employee James Weiss regarding his union activities, as finding an additional violation would be cumulative and would not affect the remedy. In the absence of exceptions, we affirm the judge's dismissal of the remaining allegations.

[6] In finding that the Respondents' issuance of the documented coaching violated Sec. 8(a)(1), we find it unnecessary to pass on whether this conduct also violated Sec. 8(a)(3), as it would not affect the remedy.

Member Hayes would adopt the judge's dismissal of this allegation for the reasons set forth in the judge's decision.

(a) Maintaining an unlawfully broad rule in their employee handbook prohibiting all solicitation on company property.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies.

(d) Soliciting employee grievances and implying that they will be remedied in order to dissuade them from supporting the International Association of Machinists and Aerospace Workers, AFL–CIO.

(e) Informing employees that their grievances with regard to team leaders have been adjusted by the demotion of team leaders in order to dissuade them from supporting the Union.

(f) Informing employees that the Respondents will not recognize the Union until there is a contract.

(g) Issuing employees documented coachings because of their protected concerted activities.

(h) Discharging employees because of their union activities.

(i) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain; specifically

(1) Laying off service technicians in the bargaining unit represented by the Union without giving notice to and bargaining with the Union regarding the decision to lay off and the effects of that decision.

(2) Unilaterally suspending skill level reviews, thereby denying promotions to employees who would have been promoted if those reviews had occurred.

(3) Unilaterally reducing the specified hours for performing prepaid maintenance work.

(j) Refusing to bargain collectively with the Union by failing and refusing to provide the Union with requested relevant information.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawfully broad rule in their employee handbook prohibiting all solicitation on company property.

(b) Notify all employees who received the employee handbook that existed in July 2008 that the no-solicitation rule has been rescinded and will no longer be enforced.

(c) Remove from their files any reference to the documented coaching issued to Dean Catalano on October 13, 2009, and notify him in writing that this has been done and that the coaching will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from their files any reference to the discharge of Anthony Roberts, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time Mercedes-Benz service technicians employed by Respondent MBO at its facility at 810 North Orlando Avenue, Maitland, Florida, excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(h) Rescind the change(s) in the terms and conditions of employment for its unit employees that were unilaterally implemented in 2009 as set forth in paragraphs (i) through (l) below.

(i) Within 14 days from the date of this Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(j) Make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the judge's decision.

(k) Make whole all employees who would have been promoted for any loss of earnings suffered as a result of the suspension of skill level reviews.

(l) Restore the former hours specified for prepaid maintenance work and make whole all employees for any

loss of earnings caused by the unilateral reduction in specified hours.

(m) Provide the Union with the requested relevant information regarding unit employees as set out in its letter of April 17, 2009.

(n) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records,

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawfully broad rule in our employee handbook that prohibits all solicitation on company property.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT coercively interrogate you regarding your knowledge of employee union activity, your union activities, and your union sympathies.

WE WILL NOT solicit your grievances and imply that they will be remedied in order to dissuade you from supporting the International Association of Machinists and Aerospace Workers, AFL–CIO, and WE WILL NOT adjust your grievances in order to dissuade you from supporting the Union.

WE WILL NOT tell you that we will not recognize the Union until there is a contract.

WE WILL NOT issue you a documented coaching because of your protected concerted activities.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain. Specifically, WE WILL NOT

(1) Lay off service technicians in the bargaining unit represented by the Union without giving notice to and bargaining with the Union regarding the decision to lay off and the effects of that decision.

(2) Unilaterally suspend skill level reviews, thereby denying promotions to employees who would have been promoted if those reviews had occurred.

(3) Unilaterally reduce the specified hours for performing prepaid maintenance work.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawfully broad rule in our employee handbook prohibiting all solicitation on company property and WE WILL notify all employees who received the handbook that existed in July 2008 that this rule has been rescinded and will no longer be enforced.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the documented coaching issued to Dean Catalano on October 13, 2009, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the coaching will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Anthony Roberts, and WE WILL, within 3 days

thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time Mercedes-Benz service technicians employed by MBO at our facility at 810 North Orlando Avenue, Maitland, Florida, excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented in 2009, as set forth below.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, with interest.

WE WILL make whole all of you who would have been promoted for any loss of earnings suffered as a result of the unilateral suspension of skill level reviews.

WE WILL restore the former hours specified for prepaid maintenance work and make all of you whole for any loss of earnings caused by the unilateral reduction in specified hours.

WE WILL furnish to the Union in a timely manner the information requested by the Union in its letter of April 17, 2009.

CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC., A SINGLE EMPLOYER

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawfully broad rule in our employee handbook that prohibits all solicitation on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawfully broad rule in our employee handbook prohibiting all solicitation on company property and WE WILL notify all employees who received the handbook that existed in July 2008 that this rule has been rescinded and will no longer be enforced.

AUTONATION, INC.

Rafael Aybar and *Christopher Zerby, Esqs.*, for the General Counsel.

Steven M. Bernstein, David M. Gobeo, and *Douglas R. Sullenberger, Esqs.*, for the Respondents.

David Porter and *Javier Almazan,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Orlando, Florida, on November 8, 9, and 10, and November 30, and December 1 and 2, 2010, pursuant to a consolidated complaint that issued on March 31, 2010, and that was thereafter expanded by an order further consolidating cases and amending the consolidated complaint on June 8, 2010.[1] The complaint alleges that the Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by actions that it took during and after a successful organizational campaign of the Union and by failing and refusing to bargain with the Union. The answers of the Respondents deny any violation of the Act. As hereinafter discussed, I find that the Respondents violated the Act as alleged in some of the allegations, but not in others.

On the entire record, including my observation of the de-

[1] All dates are in 2008, unless otherwise indicated. The charge in Case 12–CA–26126 was filed on December 11 and amended on January 7, February 7, June 8, August 20, 2009, and March 22, 2010. The charge in Case 12–CA–26233 was filed on March 16, 2009, and amended on March 22, 2010. The charge in Case 12–CA–26306 was filed on April 13, 2009, and amended on June 12 and 19, 2009. The charge in Case 12–CA–26354 was filed on May 29, and amended on June 12, 2009. The charge in Case 12–CA–26386 was filed on June 22, 2009. The charge in Case 12–CA–26552 was filed on November 19, 2009.

meanor of the witnesses and after considering the briefs filed by the General Counsel and the Respondents, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Inc., MBO, is a Florida corporation with an office and place of business in Maitland, Florida, at which it is engaged in the sale, leasing, financing, repair, and servicing of new and used vehicles. MBO annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida. MBO admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent, AutoNation, Inc., AutoNation, admits that it is a Delaware corporation headquartered in Fort Lauderdale, Florida. AutoNation owns over 200 vehicle dealerships and annually derives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida. AutoNation admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

MBO and AutoNation admit, and I find and conclude, that International Association of Machinists and Aerospace Workers, AFL–CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

The Respondents, MBO and AutoNation, admit, in separately filed answers, "with respect to the events covered by the [c]omplaint," that they are affiliated business enterprises and are jointly and separately liable for any unfair labor practices found herein. The factors critical to a finding of single employer are interrelation of operations, common management, centralized control of labor relations, and common ownership. See *Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983), cert denied 464 U.S. 1039 (1984). MBO Controller Collie Clark explained that MBO reports sales and related information to AutoNation which maintains data relating to the profitability of MBO and other AutoNation dealerships. Although General Manager of MBO Clarence (Bob) Berryhill makes the decision, all discharges must be approved by AutoNation Area Manager Pete DeVita. AutoNation's Human Resources Manager Roberta (Bonnie) Bonavia, at all relevant times herein, was responsible for human resources matters, benefits administration, and employee relations. Employees at AutoNation dealerships are subject to an AutoNation Associate Handbook. The Company's response to the Union's organizing campaign was overseen by Vice President and Assistant General Counsel of AutoNation Brian Davis who was often present at MBO and who made multiple presentations to the employees. MBO is owned by AutoNation. The foregoing evidence establishes, with regard to this proceeding, that MBO and AutoNation constitute a single employer. *Real Foods Co.*, 350 NLRB 309, 334 (2007). The admissions in the answers of MBO and AutoNation that they are jointly liable for any unfair labor practices found herein are fully supported by the record. I shall refer to MBO and AutoNation jointly as the Company or the Respondents.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Company Operations and the Appropriate Unit

The MBO dealership sells and leases new Mercedes Benz vehicles, sells used vehicles, sells parts, and performs repairs and service upon vehicles. The sales operation includes sales persons as well as employees responsible for matters related to sales, including financing agreements. The service and parts component of the dealership, referred to as the "fixed operation," includes service advisors, parts department employees, and service technicians.

The appropriate unit herein is:

> All full-time and regular part-time Mercedes-Benz service technicians employed by Respondent MBO at its facility at 810 North Orlando Avenue, Maitland, Florida, excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

In the summer of 2008, MBO had approximately 120 employees of whom about 37 were service technicians. At the time of the hearing herein, as a result of attrition and terminations, MBO had approximately 95 employees of whom 25 were service technicians. The service technicians are assigned to one of three teams, the gold, green, and red teams. Each team has a team leader, also referred to as the team foreman. The team leaders are admitted to be supervisors as defined in the Act. In the summer of 2008, the red team leader was Bruce Makin, the green team leader was Oudit Manbahal, and the gold team leader was Andre Grobler. On December 9, Grobler and Manbahal I were demoted. Makin was made team leader of the green team, Rex Strong was made team leader of the gold team, and Alex Aviles was made team leader of the red team. Each team also has a lead technician who fills in when the team leader is absent. Technicians are classified according to their skills from D to A. The highest rated technician, designated as the diagnostic technician, is an A technician.

Service technicians are paid hourly, but they are only paid for work performed. When a technician completes a job, he will place his name on a list for the next available job. Thus, the faster and more experienced technicians typically will receive the most work. If an insufficient number of vehicles is brought to the dealership for service or repair some technicians will be idle and not earning any money.

Following the Union's victory in the representation election, technicians Brad Meyer, David Poppo, and Dean Catalano were elected as shop stewards, and the Union notified the Company of their election by letter dated February 24, 2009.

B. Procedural History

The Company actively opposed the organizational efforts of the Union. Notwithstanding those efforts, the Union won the

[2] The unopposed motion of the General Counsel to correct the transcript is granted. I have designated it as GC Exh. 187, and it is hereby received.

representation election that was held on December 16, and was certified as the exclusive bargaining representative of the unit employees on February 11, 2009. MBO refused to bargain, raising preelection issues including specifically the appropriateness of the unit. On August 28, 2009, the two sitting members of the Board rejected the Company challenge to the Union's certification. *Mercedes-Benz of Orlando*, 354 NLRB No. 72 (2009). On September 3, 2009, MBO filed a petition for review of that decision with the United States Court of Appeals for the D.C. Circuit. That case was held in abeyance pending the United States Supreme Court's consideration of the validity of decisions rendered by the two-member Board. On June 17, 2010, the United States Supreme Court held that decisions by the two-member Board were not valid. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). On August 23, 2010, a three-member Board panel affirmed the prior decision that the Respondent's preelection representation issues were without merit. *Mercedes-Benz of Orlando*, 355 NLRB 592 (2010). The Board noted, at footnote 4: "To the extent that the date of the Certification of Representative may be significant in future proceedings, we will deem the Certification of Representative to have been issued as of the date of this decision." On August 25, 2010, the Board applied for enforcement of that order in the United States Court of Appeals for the Eleventh Circuit. That case is pending.

C. Preliminary Observations and Credibility Considerations

This is basically a straightforward case. It is complicated by the fact that most of the statements that are alleged to violate Section 8(a)(1) of the Act were made during the response of the Company to the organizational campaign of the Union late in 2008, some 2 years prior to the hearing herein. Many of the statements alleged to have violated the Act were made in meetings that the Company held with employees. There were multiple meetings that, as employee Brad Meyer acknowledged, "all kind of blend together after that first meeting."

I am satisfied that most of the employee witnesses sought, as best they could, to relate what they recalled being said. Due to the manner in which statements relating to the consequences of unionization were couched and the passage of time, I find that many employee witnesses recalled what the Company wanted them to hear rather than what was actually said.

Employee James Weiss is alleged to have been an agent of the Respondents. Multiple 8(a)(1) allegations in the complaint are dependent upon his testimony. Weiss had supported the Company in two prior organizational campaigns during which Pete DeVita had been General Manager of MBO. At the inception of the Company's response to the 2008 organizational campaign, on October 9, Weiss sent an email to DeVita, who was and is now an area manager for AutoNation, stating "you have my total support." Notwithstanding that pledge of support, Weiss testified that he did the Company's bidding during the campaign because of fear that, if he did not, he would be fired and blackballed. In December, shortly before the representation election, Weiss circulated an antiunion petition. At the hearing, Weiss testified that Davis solicited him to circulate the petition and send it to the Union. Davis denies that he solicited Weiss to circulate the petition or to send it to the Union. In the initial investigation of this case, Weiss denied that he was solicited to circulate the petition or showed it to Davis. At the hearing he clamed that those denials were untruthful. He also testified that he lied to Davis by telling him that he had sent the petition to the Union. Weiss' contradictory assertions of his motivation and admissions of untruthfulness belie any reliability in his self-serving testimony.

General Manager Bob Berryhill initially testified that he learned of the union organizational campaign on October 4 when he was informed that a representation petition had been filed. Notes contained in his personal notebook establish that he learned of the organizational campaign on or about September 23, a week earlier, and that between September 25 and 30, he spoke with employees regarding their knowledge of the campaign and what issues they had relative to their employment. His failure to admit his earlier knowledge of the campaign and the actions that he took weigh heavily against his credibility.

Vice President and Assistant General Counsel of AutoNation Brian Davis made multiple presentations at employee meetings. He denied using any script or outline of talking points. He took no notes. Human Resources Manager Bonavia took notes at some meetings. The notes were subpoenaed, but Bonavia was unable to locate them. She pointed out that the AutoNation offices had moved. Although Davis gave various denials regarding what he did not say, his testimony regarding what he actually did say was minimal. Davis is a skilled communicator who said what he wanted to say the way he wanted to say it. Whether, because of the absence of a script or notes to refresh his recollection, Davis often phrased his answers in terms of the "typical approach that I would take," thus not testifying to what he actually said.

Notwithstanding my foregoing concerns relating to credibility, I have credited portions of the testimony of the foregoing witnesses. Many of the 8(a)(1) allegations herein relate to conversations between Weiss and Davis. As hereinafter discussed, the substance and logic of those conversations, in most instances, result in my crediting Davis.

D. The 8(a)(1) Allegations

Paragraphs 10 through 40 of the complaint relate to specific 8(a)(1) allegations. I shall address each allegation, setting out the paragraph number and allegation as it appears in the complaint. I note that almost all of the allegations refer to "MBO's Maitland, Florida, facility" and, unless a different location is specified or the location is germane to the allegation, I shall omit that reference.

> 10. Since on or about July 8, 2008, Respondents, by issuing the AutoNation Associate Handbook to their employees employed at Respondent MBO's Maitland, Florida facility and at all of Respondent AutoNation's other automobile dealerships in the United States, has promulgated and maintained a no-solicitation rule stating in relevant part, "we prohibit solicitation by an associate of another associate while either of you is on company property."

It is undisputed that the AutoNation Associate Handbook states: "[W]e prohibit solicitation by an associate of another

associate while either of you is on company property." The Respondents offered no business justification for the foregoing prohibition against solicitation on employees' own time such as during breaks or lunch. Notwithstanding the absence of any justification for the rule, the Respondents argue that the rule as written is not enforced. The only evidence of enforcement in this proceeding relates to the circulation of the antiunion petition by employee Weiss. Weiss was directed not to solicit during working time. Despite the absence of any evidence of enforcement, "the mere existence of a broad no-solicitation rule may chill the exercise of employees' [Section 7] rights." *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 410 (4th Cir. 1968), cited in *Alaska Pulp Corp*, 300 NLRB 232, 234 (1990). The Respondents, by maintaining an unlawfully broad rule prohibiting all solicitation on company property, violated Section 8(a)(1) of the Act.

> 11. On or about dates in late July 2008 and August 2008, more precise dates being presently unknown to the General Counsel, Respondents, by Andre Grobler, created the impression of surveillance of employees' union activities.

Andre Grobler was, until December 9, team leader of the gold team, an admitted supervisory position. In late July, as employee Juan Cazorla was preparing to leave work, Grobler passed him and asked Cazorla why he was "in such a rush," and then answered his own question saying, "Oh, I guess you got that meeting to go to." Cazorla says that he "played dumb" and asked, "[W]hat meeting?" In fact, Cazorla was going to a union meeting. The following month, Grobler again commented to Cazorla, "[Y]ou better rush, you have that meeting to go to." On that occasion, Cazorla was not hurrying to a meeting; however, the record does not establish whether a meeting was scheduled. Grobler did not testify. The dates and times of meetings among the employees involved in the organizational campaign were not publically announced. The meetings were held away from the dealership. Employees who openly expressed support for the Company, such as employee James Weiss, were unable to learn when meetings were to be held.

The test regarding the creation of an impression of surveillance is whether, "under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored." *Sam's Club*, 342 NLRB 620 (2004). Grobler's July statement conveyed both his knowledge that a meeting was to be held and that Cazorla was among the employees involved with the Union. Whether Grobler, in August, assumed that Cazorla was going to another meeting because he was hurrying does not negate the creation of the impression of surveillance. The Respondents, by creating the impression that employees' union activities were under surveillance, violated Section 8(a)(1) of the Act.

> 12. On or about September 25, 2008, Respondents, by Clarence "Bob" Berryhill, solicited grievances from employees and impliedly promised to remedy them in order to induce employees to abandon their support for the Union.

As already pointed out, General Manager Berryhill learned of the union organizational activity on September 23. On September 24, AutoNation Area Manager Pete DaVita directed Berryhill and Service Director Art Bullock "to meet with the technicians and get a feel for what's going on." On September 25, they did so, calling technicians individually into Berryhill's office.

Berryhill's notebook reflects that employee Anthony (Tony) Roberts was the first technician with whom they spoke. Roberts recalls that Berryhill did most of the talking. He informed Roberts that the Company hears that "there's a union drive going on again," and "they wanted to know if there was anything they could do about it." They asked Roberts "if any of the technicians or me was having any trouble at the dealership that they could help with." Roberts mentioned that he could use "some more money or a skill level change." Berryhill explained that there was "a raise freeze at the time."

The next employee with whom Berryhill and Bullock spoke was Bradley (Brad) Meyer. Meyer recalls that Berryhill told him that the Company had heard rumors of union activity and asked whether he had "heard anything about it or if there were any issues or complaints . . . they needed to address as management." Meyer replied that there had been such rumors relating to unions since he started working there. He mentioned issues relating to service advisors taking too long and problems with the parts department. Berryhill replied that "those were things they were working on . . . they were in progress and they thought they had made some changes with that."

Berryhill, in his notebook, wrote that employee David Poppo "said that he has heard a little bit about the Union." Counsel for the General Counsel asked: "Mr. Poppo made that comment in response to a question you asked him?" Berryhill answered: "Correct." Poppo recalled that, in his meeting with Berryhill and Bullock, Berryhill stated, "[W]e understand there are some unhappy technicians and so, you know, we'd like to know what's going on see if there's any things that maybe we could correct or, you know, help out with." Poppo recalls mentioning that, in his opinion, trainees Ben Wu and Patrick Fenaughty should be promoted to technician positions.

Berryhill wrote in his notebook that employee Happy Calderon said that he had "has heard nothing about a union." When asked whether Calderon made that statement in response to a question, Berryhill answered, "Let's assume he did, yes."

None of the foregoing employees had openly identified themselves as supporters of the Union as of September 25. Berryhill had been unaware of the organizational activity. Berryhill's admitted questioning employees in his office with Service Director Bullock regarding their knowledge of union activity was coercive. Although not offering a formal amendment to the complaint, the General Counsel's brief notes that the complaint alleges interrogation by Berryhill on October 3. In view of Berryhill's admissions, the discrepancy in date is immaterial.

Berryhill further questioned the employees regarding any issues that they had. Prior to Berryhill learning of the organizational campaign, issues relating to the dealership had been presented in monthly technician advisory panel (TAP) meetings where two members of each team of technicians would meet with management. Continuation of those meetings would not violate the Act. See *Wal-Mart Stores, Inc.*, 339 NLRB 1187, 1188 (2003). The meetings on September 25 were not TAP

meetings. The Respondents argue that Berryhill had an open door policy and regularly spoke with employees. There is evidence that Berryhill often was in the shop and would speak individually with employees. There is no evidence that Berryhill had, prior to September 25, systematically sought to learn of employee concerns by individually calling them into his office and questioning them in the presence of Service Director Bullock. When Meyer identified waiting time and part problems, Berryhill assured him that MBO was "working on" the issues he raised, "they were in progress." Even before Poppo identified a specific problem, Berryhill committed to "see if there's any things that maybe we could correct or, you know, help out with."

The Respondents, by interrogating employees regarding their knowledge of union activity and by soliciting their grievances and implying that they would be remedied, violated Section 8(a)(1) of the Act.

13. On or about October 3, 2008, Respondents, by Clarence "Bob" Berryhill:

(a) Interrogated employees about their union activities and sympathies.

(b) Solicited employees to urge other employees to reject the Union.

This allegation is predicated upon testimony by James Weiss that Berryhill on October 3, a Friday, asked if he knew what was going on and, when Weiss replied that he did not, told him to go to the bulletin board, upon which the representation petition had been posted, and to come back and tell him what he thought. Weiss claims that he did so and returned, telling Berryhill that he thought it was "bullshit." He asserts that Berryhill informed him that some attorneys would be coming to "discuss some constructive ways to get rid of the union" and asked if Weiss "wanted to attend that meeting." Weiss stated that he did.

Berryhill learned of the representation petition on Saturday, October 4, and received it on October 6, thus it could not have been posted on October 3. He recalled that, at some point during the week of October 6, Weiss came to his office and told him that he had been "Pete DeVita's right-hand person," in a prior campaign and that he "wanted to offer his support any way that he could to accomplish the same thing this time." Berryhill gave no specific response because he knew that he needed to talk "with someone with AutoNation."

I credit Berryhill. Weiss volunteered his antiunion sentiments. Insofar as the invitation to the meeting constituted the solicitation alleged in the complaint, I find that General Manager Berryhill would not, without prior approval, invite an employee to an executive meeting with attorneys. I shall recommend that this allegation be dismissed.

14. On or about dates in early October 2008 through December 2008, more precise dates being presently unknown to the General Counsel, Respondents, by Andre Grobler, interrogated employees about their union activities.

Employee Larry Puzon was a technician on the gold team under Team Leader Andre Grobler. Puzon, although attending union meetings, did not openly display his prounion sentiments. After a presentation by Davis on October 10, Grobler asked Puzon if he had gone to a union meeting. Puzon untruthfully replied, "I just denied that I had gone to any union meeting." Puzon explained that, after every meeting held by Davis, that Grobler asked whether he had attended or was "going to attend" a union meeting and that he continued to deny attendance "because I know he's for management." Grobler did not testify. I credit Puzon.

Insofar as Grobler interrogated Puzon immediately following meetings conducted by Davis, his questioning appears to have been seeking to determine whether the Company response to the Union was having any effect. The interrogations of Puzon, who had not openly supported the Union, by his direct supervisor were coercive as confirmed by Puzon's unwillingness to reply truthfully that he had been attending union meetings. The Respondents, by interrogating employees regarding their union activities, violated Section 8(a)(1) of the Act.

15. On or about October 9, 2008, Respondents, by their agent:

(a) Interrogated employees about their union sympathies and about the union sympathies of other employees.

(b) Solicited employees to help Respondents discharge employees who supported the Union.

(c) Threatened to discharge and blackball employees who supported the Union.

(d) Told employees that it would be futile to select the Union as their collective bargaining representative.

(e) Threatened employees with a wage freeze and stricter enforcement of work rules if they selected the Union as their collective-bargaining representative.

(f) Created the impression of surveillance of employees' union activities.

16. On or about October 9, 2008, Respondents, by their agent, told employees that it would be futile to select the Union as their collective-bargaining representative.

On October 9, Weiss claims to have been at the meeting to which Berryhill allegedly invited him and that Berryhill, Davis, Bonavia, Human Resources Specialist Bibi Bickram, and outside counsel Douglas Sullenberger were present. At that meeting he says that Davis asked if he supported the Union and that when he answered that he did not, Davis asked who he thought were the organizers, to which Weiss replied Tony Roberts, Brad Meyer, Dean Catalano, Alex Aviles, and Ruben Santiago. According to Weiss, Davis asked whether he thought he could get one of them to "take a swing at you," and that then they could fire them and they would be blackballed. According to Weiss, Davis then stated that it would take the Union 6 years to get a contract and that, during that period, wages would be frozen. At the end of the meeting he claimed that attorney Sullenberger stated that "AutoNation will not bargain with the Union." Sullenberger, who made an appearance as counsel, did not testify.

Berryhill and Davis denied making the statements attributed to them. Berryhill, as confirmed by Davis, pointed out that Bickram was on maternity leave. Davis met with no employ-

ees on October 9. He testified: "I know I didn't meet him [Weiss] on the 9th. And I know when I first met him, it wasn't an hour meeting, and I know Bibi Bickram wasn't present, and I know I didn't say anything to James [Weiss] that he alleges that I said in that meeting." Both Davis and Berryhill denied that Sullenberger made the statement Weiss attributed to him.

The October 9 meeting was the first occasion that AutoNation personnel, including Vice President Davis and outside counsel Sullenberger, met with MBO management. Berryhill's approaches to employees on September 25 had provided sufficient information regarding employee concerns for the management team to digest. Even assuming that Weiss told Berryhill that he "wanted to offer his support" to the Company prior to October 9, I find it incredible that the Company's top managers and two labor relations attorneys would have permitted him, a rank-and-file employee, to be present at this initial consultation. Berryhill and Davis confirmed that, on occasions during the course of the campaign when Sullenberger was present and Weiss would come into Berryhill's office, Sullenberger would excuse himself. As already noted, on October 9, Weiss sent an email to Area Manager Pete DeVita, stating "you have my total support." If Weiss had already assured Berryhill of his support and committed to come to a meeting to "discuss some constructive ways to get rid of the union," I am satisfied that he would have included that information in his email. I do not credit Weiss. I shall recommend that paragraphs 15 and 16 of the complaint be dismissed.

Although I have recommended dismissal of the foregoing allegation, I find that Weiss, subsequent to October 9, did identify Tony Roberts, Brad Meyer, Dean Catalano, Alex Aviles, and Ruben Santiago as the individuals that he believed were responsible for the union's organizational effort.

> 17. On or about October 10, 2008, Respondents, by their agent:
>
> (a) Told employees that it would be futile to select the Union as their collective bargaining representative.
>
> (b) Threatened employees with blacklisting if they joined or supported the Union.
>
> (c) Solicited employees' grievances and impliedly promised to remedy them in order to induce employees to abandon their support for the Union.
>
> (d) Threatened employees with loss of ice cream and various other benefits if they joined or supported the Union.

On October 10, Berryhill and Davis conducted a meeting attended by the service technicians as well as other employees in the fixed operation. Davis, without any specifics, testified that he explained to the employees "here is what is going on. Here is what this means to you. Here is what you can expect going forward." He stated that employees could contact him directly if they had any questions.

Virtually all witness who testified recalled that a video was shown, but there are no allegations relating to the video. Employees Brad Meyer and Tony Roberts confirm that Davis stated that no one was going to be fired, an untrue statement in the case of Roberts. Although Roberts recalled that Davis referred to losing benefits such as free ice cream, Meyer recalled that the loss of ice cream was mentioned in connection with negotiations, that Davis explained that, once at the negotiating table, "all your benefits are on the table. . . . [I]t's a two-way street. . . . [Y]ou could lose a lot of things you have now that other dealerships don't have . . . [such as] the free ice cream."

Meyer recalled that Davis mentioned that the employees should think about their futures beyond MBO, that "if you go to get another job somewhere else . . . other dealers will know about the organizing campaign here . . . because in this business . . . people talk." Roberts recalled Davis making a similar statement regarding "dealers talking" and also commenting, "[W]e know who you are." Roberts was mistaken regarding that comment. Meyer specifically recalled that, in response to a question as to whether anyone other than the Union would be able to see authorization cards, Davis answered that nobody would, "It's locked away at the NLRB in Tampa."

Although Davis asked the employees what issues they had, at this first meeting, no one responded. Roberts recalled that Davis told the employees that they needed to talk to him "or nothing was going to change or get fixed."

The General Counsel's brief cites the testimony of employee Ben Wu, who was called by the Company. Wu testified Davis stated that negotiations could take months or years. The meeting at which that statement was made is not established. No witness for the General Counsel testified that any statement relating to the length of negotiations was made on October 10.

I am unaware of any case holding that an employer's reference to the time it might take to conclude a contract, in the absence of comments relating to a predetermined intention not to agree to or to reject union proposals, constitutes a threat of futility. The comments relating to other dealerships knowing of the organizational campaign at MBO did not relate to any action by the Respondents and did not threaten blacklisting. The request that employees advise Davis of their concerns, to which no employee responded, did not imply that grievances would be remedied. The mention of loss of benefits, made in the context of everything being on the table in negotiations, was not a threat. I shall recommend that this allegation be dismissed.

> 18. On or about October 17, 2008, Respondents, by their agent:
>
> (a) Told employees that it would be futile to select the Union as their collective bargaining representative.
>
> (b) Solicited employees' grievances and impliedly promised to remedy them in order to induce employees to abandon their support for the Union.

The General Counsel's brief acknowledges that there was no meeting with employees on October 17, which was the day that the representation case hearing began. Davis admits that the Company held a meeting with employees prior to that hearing. Thus the meeting occurred on October 15 or 16. Meyer recalled that a female in the parts department complained that the employees had brought up issues, but "they felt like they were being ignored or the problems weren't being fixed." Tony Roberts recalled a parts employee complaining about an inci-

dent and that "she got retaliated against and that management had the attitude of either shut up or leave." Davis responded stating that "we are finally starting to get somewhere . . . we could talk to him at any time . . . call him" and that there was a suggestion box downstairs.

There is no credible evidence that Davis made any statement relating to futility. Upon hearing the complaints that management had, in the past, been unresponsive to employee complaints, Davis' response that the employees "could talk to him at any time . . . call him" implied that the Respondents would be responsive to employees' complaints. The Respondents, by soliciting grievances and impliedly promising to remedy them, violated Section 8(a)(1) of the Act.

> 19. On or about October 30, 2008, on or about other dates in November 2008, more precise dates being presently unknown to the General Counsel, and on or about December 10, 2008, Respondents, by Clarence "Bob" Berryhill, interrogated employees about the union sympathies of other employees.
>
> 20. On or about October 30, 2008, Respondents, by their agent, and by Clarence "Bob" Berryhill, solicited an employee to go to a Union meeting to learn about employees' grievances and to report them to the Respondents.

Weiss testified that, on October 30, he was in Berryhill's office with Davis on the speaker phone and that "they asked me if I had attended any of the Union meetings." When Weiss replied that he had not, "they asked me if I could find out when the next union meeting was and attend it and find out what the employees were complaining about and relay that information back to them." Weiss further testified that they asked whether "any more employees were coming up to me saying they were for or against the Union." Weiss replied that "it didn't look any better."

Berryhill acknowledged that, on various occasions, Weiss mentioned the names of specific employees but denied that he interrogated him regarding the union sentiments of other employees, explaining that Weiss was in his office or calling him "almost daily," and that "there was pretty constant communication on his end." Berryhill did not recall a conversation in which Davis was on a speakerphone nor did he recall him asking Weiss to attend a union meeting. Davis denied asking Weiss to "find out when the next union meeting" was to be held and "tell us what the complaints are," testifying that he "never asked Weiss for any information whatsoever," that Weiss provided information of his own accord.

Insofar as Weiss was known to oppose the Union, it would have been obvious to both Davis and Berryhill that his attendance at any meeting would be considered as spying. Weiss acknowledged that, after the prior organization campaign, he was accused of being a spy for the Company. An October 13 email from Weiss to Berryhill advising that employee Larry Puzon was concerned about job security confirms that, shortly after telling Berryhill that he "wanted to offer his support," Weiss began volunteering information about his fellow employees. I credit the testimony of Davis and Berryhill that they did not solicit Weiss to attend a union meeting. I shall recommend that paragraphs 19 and 20 be dismissed.

> 21. On or about dates from late October 2008 through mid-November 2008, more precise dates being presently unknown to the General Counsel, Respondents, by James Weiss, interrogated employees about their union activities and sympathies.

The foregoing allegation is predicated upon Weiss being an agent of the Respondents. As already discussed, I find that Weiss volunteered information to the Respondents. There is no probative evidence that any action he took was directed by management. He was not an agent of the Respondents, and the Respondents were not responsible for his actions. I shall recommend that this allegation be dismissed.

> 22. On dates in November 2008, including on or about November 25, 2008, more precise dates being presently unknown to the General Counsel, and on or about December 2, 2008 and December 15, 2008, Respondents, by their agent, interrogated employees about the union sympathies of other employees.

The General Counsel, in his brief, argues that the testimony of Weiss relating to a conversation in Berryhill's office establishes that Berryhill and Davis questioned Weiss regarding his opinion as to whether employee Ted Crossland supported the Union. Weiss testified that he replied that he did not think so, but Davis disagreed, stating that the Company "pretty much" knew that he was for the Union.

In a separate conversation, Davis and Berryhill spoke with Weiss regarding whether Team Leader Oudit Manbahal had ever belittled him. Weiss stated that he had not. When asked what Weiss thought of Manbahal, Weiss answered that he "was a good guy but had no backing from the Company." Davis noted that comments in the employee suggestion box revealed that the "shop foremen [team leads] need to be replaced." The Union was not mentioned.

At the time of this conversation, Manbahal was a team leader, a supervisor. Weiss does not claim that he was asked anything relating to the Union with regard to Manbahal. As already noted, Berryhill and Davis deny questioning Weiss, explaining that he regularly volunteered information to them. I credit their denials. Weiss had been voluntarily providing information relating to his fellow employees for well over a month. Even if I were to find that Weiss was questioned regarding Crossland, I would further find that any such questioning was not coercive. I shall recommend that this allegation be dismissed.

> 23. On or about a date in November 2008, a more precise date being presently unknown to the General Counsel, Respondents, by their agent:
>
> (a) Promised to redress employees' grievances in order to induce employees to abandon their support for the Union.
>
> (b) Threatened employees with loss of jobs if they selected the Union as their collective-bargaining representative.
>
> 24. On or about a date in mid-November 2008, a more precise date being presently unknown to the General Counsel, Respondents, by their agent:

(a) Threatened employees with discharge if they engaged in union activities.

(b) Told employees it would be futile to select the Union as their collective-bargaining representative.

The General Counsel, in his brief, addresses these allegations together and focuses upon a meeting in which Davis asked the employees to "look around." The testimony of the employees relating to his remarks varies in detail. Poppo recalls Davis making a reference to this being the "third" organizational campaign at MBO and that there was not going to be another, but no other employee attributes that remark to him. Meyer recalled Davis stating that if the employees did not "get on board" their jobs were not safe. Roberts and Weiss recalled that Davis stated that only Berryhill's job was safe.

Service Sales Manager Maia Menendez explained that the foregoing meeting occurred shortly after a nearby AutoNation Pontiac/GMC dealership closed. Bobbie Bonavia, who was present at the meeting, was extremely upset, crying, insofar as she had not been able to place all of the employees who had lost their jobs. Although employee Tony Roberts professed ignorance of the closure, neither he nor any other witness contradicted the testimony of Menendez.

Davis admits that he told the employees: "Look around you. Take a look at the people next to you. There's a good chance that person may not be here in six months . . . . [T]here's only one person in this room whose job is safe, and that's this man right here," pointing to Berryhill. Davis continued, stating, "This is serious business, okay. This is not about a union campaign. This is about an industry on the verge of collapse."

As already noted, Davis claims to have had no script and made no notes. Although I view his representations skeptically, in the absence of corroborative testimony establishing that Davis couched his remarks in terms relating to the organizational campaign rather than current economic circumstances, I do not find that his remarks conveyed any threat related to union activity. I shall recommend that paragraphs 23 and 24 of the complaint be dismissed.

25. In or about late November 2008 or early December 2008, a more precise date being presently unknown to the General Counsel, Respondents, by their agent, interrogated employees about their union sympathies.

In early December, Tumeshwar (John) Persaud was in his work area. Vice President Davis was "walking around talking to the tech[nician]s." When he came to Persaud he asked how Persaud "felt about the election." Persaud replied, "I think that the Company is going to learn I think we have a good chance." Davis smiled and walked away. Persaud had not openly supported the Union. Berryhill believed that Persaud, who worked next to Weiss, supported the Company. Davis did not specifically deny the foregoing conversation.

Persaud was confronted individually by the AutoNation vice president who had, over prior weeks, been making presentations on behalf of the Company. The question asked by Davis, what Persaud thought about the election, demanded a response from this employee who had not revealed his union sympathies. Persaud was placed in the position of ignoring the question, thereby suggesting his own sympathies, or stating his perception of the union sympathies, or lack thereof, of his fellow employees. I find that the questioning of Persaud by Davis was coercive. The Respondents, by interrogating employees regarding their union sympathies, violated Section 8(a)(1) of the Act.

The brief of the General Counsel misstates the allegation of paragraph 25 by including Berryhill as an interrogator. Notwithstanding the absence of an allegation, the General Counsel addresses an exchange between Berryhill and Persaud in late November or early December, when Persaud was working with employee Ken Council and Berryhill walked by. Council initiated the exchange, saying, "Hey, Bob, you know, you got my vote, right?" Berryhill replied, "[Y]eah, I know I do, but I didn't hear John [Persaud] saying that." At that point, Persaud said, "[Y]eah, I got it." Berryhill did not address the foregoing unalleged exchange, thus it was not fully litigated. I make no finding with regard to it.

26. On or about November 29, 2008, Respondents, by their agent:

(a) Asked employees to prepare a petition opposing the selection of the Union as the employees' collective-bargaining representative.

(b) Asked employees to solicit other employees to sign a petition opposing the selection of the Union as the employees' collective-bargaining representative.

(c) Threatened to blackball employees who supported the Union.

27. On or about December 4, 2008, Respondents, by their agent, asked employees to solicit other employees to sign a petition opposing representation by the Union.

28. On or about dates in early December 2008, more precise dates being presently unknown to the General Counsel, Respondents, by James Weiss, circulated a petition against the Union among employees and solicited employees to sign the petition.

Weiss recounted a meeting on November 29 in which he and Davis were "talking about different dealerships and stuff," and that Davis commented that an employee in South Florida had been "blackballed from the whole marketplace." Weiss did not state the reason that this occurred or why the employee was blackballed. Davis denied using that term. Weiss claimed that in that same conversation Davis stated that, during an organizing campaign at a dealership in Pembroke Pines, Florida, he had a technician start a petition against the Union and asked if "I would do the same" and get it to Union Organizer David Porter. Weiss replied, "[Y]eah, I'll do it."

Davis denied soliciting Weiss to circulate a petition. He recalled that Weiss asked what had happened at Pembroke Pines, and Davis explained that "the associates got together and generated their own petition" which he thought they had submitted to the Board.

The testimony of Weiss defies logic. The technician who allegedly did Davis' bidding and started "a petition against the Union" at Pembroke Pines certainly would not have been blackballed. Weiss alleges no statement that the employee who was purportedly blackballed related to fail-

ure to do the bidding of the Company. Weiss had been voluntarily supplying information to the Company since mid-October. Even assuming that Davis would threaten him, there would be no reason for a threat unless Weiss refused to do his bidding. I credit Davis that no threat was uttered and that no request that Weiss circulate a petition was made.

Weiss admitted that, during the investigation of this case by Region 12, Board Agent Rachel Harvey asked him if Davis had instructed him to circulate a petition, and "I said that he did not." Harvey also asked whether Davis had ever seen the petition. Weiss told her that "he did not." I do not credit his assertions at this hearing that those responses were untruthful. Insofar as the solicitations that Weiss made to have employees sign the petition were not made as an agent of the Respondents, I shall recommend that paragraphs 26, 27, and 28 of the complaint be dismissed.

> 29. On or about dates in early to mid-December 2008, more precise dates being presently unknown to the General Counsel, Respondents, by their agent, told employees that their grievances had been adjusted by the demotion of Andre Grobler and Oudit Manbahal, in order to induce employees to abandon their support for the Union.
>
> 30. On or about December 9, 2008, Respondents, by Clarence "Bob" Berryhill, Florida facility, told employees that their grievances had been adjusted by the demotion of Andre Grobler and Oudit Manbahal from their team leader positions, and by the replacement of Andre Grobler and Oudit Manbahal as team leaders by Alex Aviles and Rex Strong, in order to induce employees to abandon their support for the Union.

The foregoing allegations relate to the announcement of the decision of the Company to replace Grobler and Manbahal as team leaders effective on December 9, 1 week before the representation election. Berryhill made the decision because of "[f]eedback from a lot of different associates and different things that had occurred just over a period of time . . . numerous complaints about the leadership abilities, many, many things." As reflected in Berryhill's notebook, employees had complained about Grobler and Manbahal when he solicited their grievances on September 25. Berryhill informed the technicians of the Company's action on December 9 at an impromptu meeting on the shop floor.

Employee Brad Meyer recalled that Berryhill stated that, "as we told you, we were going to fix some of the problems in this dealership . . . some of the complaints that we have received from the employees." He then mentioned that the employees had seen some of the changes and that "some of the changes we haven't done yet, but we are going to continue to try to make improvements here." Berryhill then announced that, "as of today," Grobler and Manbahal were no longer team leaders, that Alex Aviles and Rex Strong were the new team leaders for the red and the gold teams respectively.

Larry Puzon corroborated the foregoing testimony. He recalled that Berryhill announced that this was "the beginning of fixing the problems that you guys brought in," that the Company was "demoting Andre [Grobler] and Oudit Manbahal."

Berryhill was asked whether he informed the employees, "We told you we would fix the problems." Berryhill answered, "I don't recall making that statement." I credit the mutually corroborative testimony of Meyer and Puzon who recalled that Berryhill did refer to having heard complaints and that the Company was beginning to "fix the problems."

Weiss recalled that, in a separate conversation with Davis, Davis commented that the Company "had bought some of the technicians' votes; they demoted the shop foremen." Weiss recalled that Davis mentioned having had "talks" with Juan Cazorla. Cazorla acknowledged that he had spoken to Davis regarding what he perceived as unfair treatment by team leader Grobler, and Davis agreed that the treatment had been unfair. Cazorla did not claim that Davis promised to do anything. On cross-examination Weiss noted that Davis, in addition to "talks" with Cazorla, attributed the replacement of Grobler and Manbahal to "the consensus of the suggestion box." Davis denied making any statement relating to buying votes and noted that, although he considered himself to be "a trusted advisor" to Berryhill, that he did not have the authority to make such personnel decisions. I credit the foregoing denial insofar as I am satisfied that Davis would not have referred to buying votes. I find that Davis and Weiss did discuss the demotion of the team leaders and that, in that discussion, Davis referred to a conversation with Cazorla and attributed the demotions to "the consensus of the suggestion box."

The Respondents, by informing employees that their grievances with regard to team leaders had been adjusted by the demotion of the team leaders in order to induce employees to abandon their support for the Union, violate Section 8(a)(1) of the Act.

> 31. On or about December 16, 2008, Respondents, by their agent:
>
> (a) Interrogated employees about the union sympathies of employees.
>
> (b) Interrogated employees about whether employees had voted in the secret ballot election conducted by the Board.
>
> (c) Threatened employees with closer supervision because they selected the Union as their collective-bargaining representative.
>
> (d) Informed employees that it was futile for them to select the Union as their collective bargaining representative.
>
> (e) Created the impression of surveillance of employees' union activities.
>
> (f) Threatened to discharge employees because they selected the Union as their collective-bargaining representative.

This allegation arises from conversations that Weiss allegedly had with Davis before and during the election and comments made by Davis following the election. Davis asked how Weiss thought certain employees were going to vote and, when Weiss stated that he did not know how employees Cazorla and Puzon would vote, Davis stated that he, Davis, needed to speak

with them. Weiss claims that, during the election, Davis asked who he had seen going to vote. Weiss explained that his work area was near the stairs that went to the second floor where the election was being conducted. Davis denies the foregoing. He admits having "some interaction" with every employee on the day of the election, and it would be logical for him to want to know if there were specific employees that he should make it a point to speak with. I credit Weiss, but find that the inquiry Davis made to Weiss, who had been providing the Company with information for 2 months, was not coercive.

Weiss could not know whether any employee he observed going up the stairs was going upstairs to vote or for some other purpose, nor could he know whether that employee had voted. There is no claim that Weiss engaged in list keeping. See *Snap-On Tools, Inc.*, 342 NLRB 5, 7 (2004).

Following the election, which the Union won, Weiss claims that Davis stated, "I know John Persaud voted yes." Davis denies the foregoing statement and recalled that Weiss informed him that he was "very suspicious" regarding how Persaud had voted. There is no evidence whatsoever that the secrecy of the ballots cast in the election was compromised. I credit Davis.

Shortly after the election, Berryhill and Davis met with the employees and announced the election results. Both expressed their disappointment. Employees Brad Meyer and David Poppo recall that Davis stated that employees had lied to him. Davis acknowledges that he was upset and that he made comments regarding trustworthiness. Various employees recalled different statements made by Davis. Meyer recalled him referring to accountability and stating that employees would be held "three times accountable." No other employee recalled that statement being made, and I do not credit it. Poppo recalls that Davis stated that everyone needed to work together, that the Company was going to conduct business "however they want to conduct business . . . Union or no Union." Employees Dean Catalano and James Weiss recalled that Davis said it would take a long time to get a contract. John Persaud initially testified that Davis referred to getting rid of anyone "that was not supporting the Company," but thereafter acknowledged that the foregoing was his interpretation of a statement that Davis made explaining that the Company would "keep making changes" whether the Union was there or not. Employee Juan Cazorla recalled Davis stating that employees should look around, that there were going to be changes. Employee Larry Puzon attributed to Berryhill a statement that employees who were not happy were free to leave. I do not credit the uncorroborated testimony of Cazorla and Puzon. I am satisfied that, like Persaud, they gave their interpretation of what they recall Davis saying.

Davis acknowledged stating that the things that the Company had "committed to do for this dealership to make it a better place to work are still going to happen. We're going to work tirelessly to make it happen." He also admitted stating that things "might get worse before they get better around here." Regarding negotiations, Davis recalled stating that "the process . . . is long, and it can be arduous, and neither side is going to roll over. You guys [the Union] have an agenda. We [the Company] have an agenda, and we're going to have to negotiate that." The foregoing statement does not threaten futility.

As the meeting was ending, Meyer accused Davis of threatening the employees. Davis responded that he "never threatened anybody." Meyer replied, "[Y]es you did." Davis asked, "[W]hat did I say that was threatening?" Meyer answered that he did not know, that he would have to look at his notes. Meyer did not follow up on this conversation with Davis. The foregoing exchange, to which Meyer testified, confirms my earlier observation that the manner in which Davis framed his statements resulted in employees hearing what the Company wanted them to hear rather than what was actually said. I shall recommend that paragraph 31 be dismissed.

> 32. On or about December 19, 2008, Respondents, by their agent:
>
> (a) Threatened to discharge employees because they selected the Union as their collective-bargaining representative.
>
> (b) Informed employees that it was futile for them to select the Union as their collective bargaining representative.

On December 19, Weiss discovered that someone had placed a union sticker on his toolbox. He reported this to Davis who purportedly spontaneously informed him that, if it was Puzon, Persaud, or Cazorla, that they would not be working there much longer, that he was going to fire them within 60 days. Weiss, in somewhat confused testimony, claims he asked Davis, "[W]hen is the union contract getting back?" He then revised that testimony, saying that he asked, "When are the employees going to get a contract?" According to Weiss, Davis responded, "[T]he day I die." Davis testified that he has no authority with regard to personnel decisions and denied making either of the foregoing comments. Although other witnesses recall Davis speaking about the potential length of negotiations, no witness other than Weiss attributes the "day I die" comment to him at any time. I credit Davis and shall recommend that this allegation be dismissed.

> 33. On or about dates from mid-December 2008 through mid-January 2009, and on or about January 11, 2009, more precise dates being presently unknown to the General Counsel, Respondents, by Clarence "Bob" Berryhill, threatened employees with discharge because of their union activities and sympathies.

This allegation is predicated upon testimony by Weiss that he reported to Berryhill that employees were spreading untrue rumors about him and that he suspected Catalano, Meyer, or Santiago. Notwithstanding the foregoing list, Weiss recalled that Berryhill asked whether employee Juan Cazorla had harassed him. When Weiss replied that he "did not think so," Berryhill purportedly told Weiss that if he charged Cazorla with harassment, the Company would fire him. On January 11, Weiss reported that he was being harassed by Catalano, Meyer, or Wong. On that occasion he claims that Berryhill told him that the Company was working with the law firm of Fisher and Phillips, that the Company would be "getting rid of them" and to "hang in there."

Berryhill denies the foregoing conversation. The Respon-

dents did not get rid of Catalano, Meyer, Santiago, or Wong. Wiess's claim that Berryhill questioned him about Cazorla, whom he did not mention, is illogical and would presumably have caused Weiss to have asked why Berryhill was talking about an employee that he had not mentioned. I credit Berryhill and shall recommend that the foregoing allegations be dismissed.

> 34. On or about a date in early January 2009, a more precise date being presently unknown to the General Counsel, Respondents, by Charles Miller, threatened to demote employees because of their union sympathies and activities, and promised to promote employees because they opposed the Union.

In January 2009, Weiss was speaking with Parts Director Charles Miller who was serving as service director in the absence of Art Bullock. Weiss claims that he asked why Miller had Dean Catalano, "a strong union supporter as a lead tech[nician]," noting that Catalano was "influencing the rest of the guys." According to Weiss, Miller confirmed with Weiss that he had previously been a lead technician, a position he had relinquished. Miller then stated, "[W]e'll just get rid of Dean, and we will give you your old job back."

Miller credibly denied the foregoing, that he had no idea what Weiss was referring to in his testimony. He noted that he had no jurisdiction relating to demotions. Weiss was not given Catalano's lead technician position. I shall recommend that this allegation be dismissed.

> 35. On or about January 20, 2009, Respondents, by their agent, threatened employees with stricter enforcement of work rules because they selected the Union as their bargaining representative.

On January 20, when he had no vehicle to work on, Weiss was working on a remote control helicopter. Davis came by and asked, "Doesn't Brad Meyer fly helicopters?" When Weiss responded that he did, he claims that Davis stated that "things like that will have to come to an end and we will see how Brad [Meyer] likes that." Weiss admitted that his conversation with Davis continued, and that, after Weiss referred to another employee whose hobbies included remote control helicopters, Davis stated that that it would be "kind of pointless to punish you too . . . just because Brad [Meyer] flies helicopters."

Davis denied making any comment relating to stopping Meyer from working on remote control helicopters when he had no vehicle to work on. Even if I were to assume that Davis' reference to working on hobbies coming to an end constituted a threat, the threat was immediately retracted.

There is no evidence of any work rule prohibiting employees from working on a hobby when there were no vehicles to be worked on. Employees engaged in various activities when they had no vehicle to work upon including playing handball and dominoes, and there is no evidence that that practice ever changed. I shall recommend that this allegation be dismissed.

> 36. On or about dates in late January 2009 or early February 2009, more precise dates being presently unknown to the General Counsel, Respondents, by their agent:
>
> (a) Threatened to discharge employees because of their union activities and sympathies.
>
> (b) Promised employees promotions if they made claims of misconduct by other employees who supported the Union.

In January 2009, Weiss began hearing rumors that he was a drug addict. He approached Davis and asked whether he could lose his job over that. He recalled that Davis replied that "before anybody gets reprimanded or written up" it would have to go through him and that Weiss' job was safe. Davis asked who Weiss suspected, and Weiss replied, "Dean Catalano, Manchung Wong, Brad Meyer maybe." According to Weiss, Davis referred to Catalano, the first individual that he had mentioned, and told Weiss that if he was "willing to put it in writing, we will fire him and we will give you your lead tech job back." Weiss says he refused stating that he did not know "definitively that it's him that's the one spreading the rumor harassing me."

In early February 2009, Weiss again spoke with Davis, complaining that someone had scratched his car with a key. As in January, he claims that Davis told him that, when he was willing to put it in writing, "We will fire them." Davis told Weiss to take pictures of his car. Weiss said that he did so, but admits that he never provided them to Davis.

Davis denied threatening to discharge any employees or promising to give Weiss the lead tech job. Consistent with the foregoing denial, Davis explained that, on March 25, 2009, when he, Berryhill, and Bonavia took Weiss and employee Oudit Manbahal to lunch at a local barbeque restaurant, Weiss continued to make claims of harassment. Davis explained to Weiss that, before any action could be taken against any employee, Weiss needed to get "evidence together that allows us to legitimize the need for the investigation" so that it did not look like the Company was harassing the individuals he implicated without justification. He directed Weiss to "[t]ake some time, and put pen to paper and generate a document for me that lays out what your allegations are. Who, what, when, where, and how." Weiss never did so.

I credit Davis's denial, and I shall recommend that that this allegation be dismissed.

> 37. On or about a date in early March 2009, a more precise date being presently unknown to the General Counsel, Respondents, by their agent, threatened employees with unspecified reprisals if they cooperated in the Board's investigation of unfair labor practice charges against Respondents.

Weiss contends that, upon receiving a letter dated March 3, 2009, from Rachel Harvey relating to the investigation of charges in this case he spoke with Berryhill who told him to call Davis. He did so, explaining that he had received the letter. He asked Davis, "[W]hat do you want me to do? You want me to lie or tell the truth?" According to Weiss, Davis replied, "[T]here's no need for that. You know the Company has put a lot of trust in you, and we know that you will keep the Company's best interest in mind." Weiss says he responded by stating to Davis that he had said "employees were going to get let go," and asked when that

was going to happen, that it "hasn't happened yet." Weiss says that Davis replied that Weiss needed "to understand that if we just go and fire somebody . . . the Union would just get them their job back and we don't want that. . . . [W]e are doing things the right way. Just hang in there."

Following his conversation with Davis, Weiss, on March 10, 2009, spoke with the board agent and, as already noted, denied that Davis instructed him to circulate the petition or that he had showed it to Davis.

Davis denied having any conversation with Weiss regarding the Board until after his resignation when Weiss had received a subpoena. He specifically denied that Weiss asked whether he should lie or tell the truth. Relative to the conversation after Weiss received a subpoena, Davis says that he told Weiss that "the only thing we ask of you, as we always have, is just to be honest. Tell the truth." I credit Davis.

I shall recommend that this allegation be dismissed.

> 38. In or about mid-March 2009, a more precise date being presently unknown to the General Counsel, Respondents, by Clarence "Bob" Berryhill, solicited employees to make claims of misconduct against other employees because of the other employees' support for the Union.

Weiss claimed that, after the barbeque lunch noted above, Berryhill called and asked him to put something in writing regarding Catalano harassing him. When Weiss stated that, although he suspected Catalano, he was not comfortable doing that insofar as he was not certain that Catalano was responsible. Berryhill purportedly repeated the request, stating that the Company was counting on him. Thereafter, Weiss claims to have sent an email stating that Catalano was harassing him, but the email was not produced or placed in evidence.

Berryhill denies soliciting that Weiss to make any report. He noted that, prior to the election, Weiss told him that Catalano would regularly stop at a bar on his way home from work and suggested reporting to the Florida Highway Patrol that the driver of a silver Honda was "wobbling all over the road," which would result in an arrest and "when you get a DUI with AutoNation, you don't have a job." Berryhill replied that he would not do that to his "worst enemy." Weiss, who admitted approaching Miller regarding Catalano being a lead technician, was not recalled to deny the foregoing testimony. I credit Berryhill. I shall recommend that the foregoing allegation be dismissed.

> 39. On or about February 1, 2009, Respondents stopped providing ice cream to employees in the Unit pursuant to their threat described above in paragraph 17(d).

Beginning in 2007, the dealership had what was referred to as "Ice Cream Fridays" upon which ice cream bars were provided to all employees at the dealership. As already noted, Davis mentioned this in one of his presentations, pointing out that "once you get to the negotiating table, all your benefits are on the table . . . it's a two-way street." He mentioned that the employees could lose things that other dealerships did not have such as free ice cream. I have already found that, in context, the foregoing did not constitute a threat.

Although the complaint alleges that the cessation of "Ice Cream Fridays" occurred in February, employee Brad Meyer noticed that it had ceased in January. He heard from some employees that the cessation was related to costs. At a morning meeting on January 20, 2009, Meyer raised the issue. Service Sales Manager Maia Menendez noncommittally responded that "it was just a decision that was made," with no further explanation. Meyer confirmed that ice cream is still sometimes provided, but not on a weekly basis.

Berryhill thought that the weekly provision of ice cream ended contemporaneously with the discharge of the three technicians in December, testifying that "it just didn't make sense [to continue to provide free ice cream] where the business was going to continue to consider firing people because there's not enough business." He pointed out that "we still buy ice cream and watermelons and things like that from time to time."

The regular provision of free ice cream to all employees was a gift insofar as it was not linked to "wages, seniority, or work performed." See *Stone Container Corp.*, 313 NLRB 336, 337 (1993). Thus the cessation, assuming it occurred after the December 16 election, would not have been a unilateral change in terms and conditions of employment over which the Union would have been entitled to bargain. I am aware of no precedent holding that cessation of a gift violates the Act. Insofar as far more employees than the service technicians were affected, I am convinced that the cessation was a cost cutting measure unrelated to union activity. The General Counsel did not establish that the cessation of the regular provision of ice cream constituted retaliation for employee union activity. I shall recommend that this allegation be dismissed.

> 40. On or about March 31, 2009, Respondents, by Clarence "Bob" Berryhill:
>
> (a) Told employees that Respondents would not recognize the Union as the collective bargaining representative of the Unit until Respondents and the Union entered into a collective-bargaining agreement.
>
> (b) Told employees that Respondents would not allow Union stewards to serve as representatives of employees in the Unit in meetings between Respondents and employees in the Unit concerning disciplinary matters.

This allegation is predicated upon comments made by Berryhill to shop steward Dave Poppo following a TAP meeting. Berryhill requested that Poppo remain, and he did so. Berryhill noted that he could stop him from wearing his steward pin, but was not going to do so. He informed Poppo that there was a rumor that employees were being told that they were entitled to representation by a shop steward when they were being disciplined, and that was not true. Berryhill continued, stating that the Company did not "recognize the Union unless there is a contract." Poppo explained that he understood that, pursuant to the "Weingarten Act," employees were entitled to representation "as a witness for disciplinary action." Berryhill stated that he would check with Davis. Berryhill did not thereafter report to Poppo whether he had contacted Davis or what Davis told him. Berryhill did not deny the foregoing conversation.

There is no evidence that any employee who has sought representation during an investigative interview has been denied

representation. Berryhill told Poppo that employees were not entitled to representation when they were being disciplined. Poppo failed to distinguish between investigatory interviews that could lead to discipline, at which represented employees are entitled to assistance from their Union, and meetings in which discipline is actually imposed where there is no such entitlement. See *Baton Rouge Water Works Co.*, 246 NLRB 995 (1979). I shall recommend that subparagraph 40(b) be dismissed.

It is undisputed that Berryhill told Poppo that MBO did not "recognize the Union unless there is a contract." The foregoing statement, precluding the employees' right to representation prior to agreement upon a contract, "communicated to employees the futility of trying to deal with the Respondent through their own designated representatives." *Dish Network Service Corp.*, 339 NLRB 1126, 1128 (2003). The Respondents, by informing employees that the Respondents would not recognize the Union until there was a contract, violated Section 8(a)(1) of the Act.

The allegations relating to the foregoing conversation are alleged to violate Section 8(a)(5) of the Act. I have recommended dismissal of subparagraph 40(b). The Respondents are contesting the certification of the Union. Berryhill's statement, although threatening refusal to recognize the Union until conclusion of a contract, does not constitute a refusal to bargain. I shall recommend that the 8(a)(5) allegation relating to this paragraph be dismissed.

E. The 8(a)(3) Allegations

1. The discharge of Anthony (Tony) Roberts

a. Facts

Roberts was a certified master technician and was rated at skill level B+. He began his employment with MBO on May 20, 2002, and had more seniority than 14 of the other technicians. He began attending union meetings at the inception of the campaign and signed an authorization on July 8. He spoke with other employees about the Union and invited employees, including Brad Meyer, to come to meetings. Berryhill's notebook reflects that he was the first technician with whom he and Bullock spoke on September 25, when the Company learned of the organizational activity.

On December 8, Roberts was called to the office of Berryhill where Charles Miller, who was serving as acting service director was present. Berryhill informed Roberts that he was "downsizing the dealership and that he was going to be permanently laying me off." Roberts asked why it was he who was being laid off, and Berryhill repeated, "[W]e are just downsizing." Roberts pointed out that he had seniority "over half the shop." Berryhill repeated that he was "downsizing." Roberts responded that he had been told that the last one hired would be the first one fired. Berryhill answered that whoever told him that was lying.

Roberts' uncontradicted testimony establishes that, in 2004, parts employee Doug Huff was laid off. When the technicians complained, stating that he was the best parts employee, Service Director Art Bullock explained that it was "AutoNation's policy that the last one hired would be the first one let go." Although Berryhill was not general manager in 2004, the selection of Roberts in 2008 was made by Bullock. Bullock was not present when Roberts was discharged, and he did not testify. Berryhill acknowledged that there were technicians who were junior to Roberts but that he had "never gone by straight seniority."

I have credited the testimony of Weiss that he informed Berryhill and Davis of the individuals whom he believed started the organizational effort. Berryhill acknowledged having conversations "almost daily" with Weiss, and he did not deny that Weiss reported Roberts as having been one of the instigators of the organizational campaign. Roberts was the first person shown in Berryhill's notebook as being questioned on September 25. In a carefully phrased question, counsel for the Respondents asked Berryhill: "[T]o your knowledge, had Mr. Roberts demonstrated any sympathies toward the union in your presence up to that point [his discharge] in time?" Berryhill answered, "Not to my knowledge, no." Weiss recalled that, in late October, Berryhill referred to Roberts as a "troublemaker . . . he's been a problem since day one, and he's one of the key guys who started the Union." I do not credit Berryhill's denial of that statement. With regard to the "troublemaker" comment, I note that on June 27, Roberts received a verbal counseling for questioning the merit of a contest relating to "up-sales" that Roberts felt was selling customers things that they did not need and that such selling would "run our customers out the door." The Respondents were aware of the union activities of Roberts.

Berryhill acknowledged that there were technicians with lower skill ratings than Roberts, but that was not "a deciding factor at all" relative to his termination. Documentary evidence establishes that there were nine technicians with lower skill ratings than Roberts including Ben Wu and Patrick Fenaughty, who according to General Counsel's Exhibit 118 both held a skill rating of D. The record is unclear as to whether a skill rating of D is the same as a trainee. Whether they were trainees or D technicians is immaterial insofar as they were the two employees with the lowest skill ratings.

At the same time that Roberts was discharged, employees Ted Crossland and Edward Fries were discharged. There are no allegations relating to their discharges; however, they were both subject to charges filed by the Union. The Respondents' position statement, submitted to Region 12, explains that there were two alignment technicians and two tire technicians and that lack of work dictated a reduction-in-force. Alignment technician Crossland was selected because his "call backs," i.e. returns to the dealership because the initial problem was not corrected, were greater than those of the employee who was retained and his productivity, measured in hours sold, was less. Tire technician Edward Frias was selected because of faulty installations and failure to confirm tire size as well as lower productivity than the employee who was retained.

Roberts' productivity, as shown by hours sold, was higher than 19 of the other service technicians as well as one of the alignment technicians and both tire technicians. The Respondents' position statement states that, unlike Crossland and Frias, Roberts' selection "was not made by comparing him directly to one other individual" but upon a determination that

his "skill set was least well-suited for the modern automobile service that the dealership provides." No explanation regarding his alleged unsuitability relative to his productivity was offered.

Berryhill claimed that it was obvious to him that the dealership "had too many people back there," and that he felt obligated, in addition to Crossland and Frias, "to at least select one person [service technician] to help the workload."

Berryhill spoke with Service Director Art Bullock about "who would possibly be a candidate or two." Berryhill testified that Bullock identified Roberts who purportedly reported that Roberts had not "shown a real interest in furthering his education" in the area of diagnostics. The most recent evaluation of Roberts in the record is dated August 13, 2007. It rates Roberts at 2, "on target," regarding knowledge, skill, and experience, and states that he needs to "continue developing electrical diagnostic skills." There is no statement relating to insufficiency with regard to his skills or any lack of interest.

Berryhill claimed that he also spoke with Roberts' Team Leader Bruce Makin who stated his opinion that Roberts had "the least amount of upside of the technicians we had in the shop." Berryhill, so far as this record shows, did not consult with the team leaders of the other teams. Makin, team leader of the red team, was not shown to have been in a position to offer his opinion as to the members of the gold and green teams. Berryhill acknowledged that Roberts was "a good technician, but a decision had to be made for someone to go." The foregoing testimony fails to note that, when he initially approached Bullock, he referred to "a candidate or two."

Berryhill, when testifying pursuant to Section 611(c) of the Federal Rules of Evidence, said that he consulted with Alex Aviles, who was appointed team leader the day after Roberts was discharged. Aviles denied that he had any input into the selection of Roberts. When called by the Respondents, Berryhill did not mention receiving any input from Aviles, referring only to Bullock and Makin. Berryhill acknowledged that he was not a technician and had little knowledge of the technicians' "true abilities, I don't dive that deep into it. That's not my position." Thus he acted upon Bullock's recommendation. Neither Bullock nor Makin testified.

b. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that Roberts engaged in union activity and the Respondents were aware of that activity. I also find animus. The discharge of Roberts was an adverse action that affected his employment, and Berryhill's identification of Roberts as a troublemaker and instigator of the organizational campaign establish that his protected activities were a substantial and motivating factor for his discharge. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for Respondents' action. *Manno Electric*, 321 NLRB 278 (1996). Thus, the burden of going forward to establish that the same action would have been taken against Roberts is upon the Respondents.

Berryhill admitted that he was not a technician and relied upon the recommendation of Bullock, a recommendation with which Team Leader Makin agreed purportedly because Roberts had "the least amount of upside of the technicians we had in the shop." Whether Roberts' support of the Union was the basis for Makin's opinion relating to Roberts' "upside" is not established on this record because Makin did not testify.

Similarly, the record does not reflect how Bullock concluded that Roberts did not show "a real interest in furthering his education." There is no evidence that Roberts was counseled or otherwise notified of any deficiencies in his skills, and his productivity confirms that he had none. Roberts' evaluation shows him to be "on target" with regard to skills and, under job performance, it reports that Roberts "works hard to ensure that jobs are done completely and correctly." Bullock did not testify.

The failure of Bullock and Makin to testify compels an adverse inference that, had they done so, their testimony relating to the alleged deficiencies of Roberts would reveal that the Respondents were motivated by animus towards Roberts because of his union activities.

An employer's choosing to retain a trainee but to lay off a senior employee who has "superior experience, proficiency, and service . . . when the senior employee is a union activist, supports the inference that the actual motive for the layoff was unlawful." *Pacific Southwest Airlines*, 201 NLRB 647, 655 (1973), enfd. 550 F.2d 1148 (9th Cir. 1977).

The Respondents, in determining which tire technicians to lay off, compared them. The Respondents chose not to make any comparison when selecting a regular service technician for discharge because Roberts would not have been selected. He had greater seniority than 14 of his fellow employees, having been employed since May 20, 2002. Ben Wu had been hired in August 2007, and Patrick Fenaughty had been hired in November 2005. Roberts booked more hours that 19 of the regular service technicians. Roberts had a skill level of B+, higher than nine of the regular service technicians. Fenaughty and Wu, whether trainees or D technicians, had less seniority, lower skill levels, and less productivity.

The Respondents have not established that Roberts would have been discharged in the absence of his union activity. I find that the Respondents discharged Roberts because of his union activities and in so doing violated Section 8(a)(3) of the Act.

2. The April discharges

a. Facts

The national financial decline in 2008, resulting in bankruptcies and bailouts, had a profound impact upon automobile sales and service. Controller Collie Clark presented documentary evidence relating to the impact upon MBO. In 2007, MBO sold 1114 vehicles. In 2008, only 728 were sold. The dealership profits dropped 40 percent from $7.6 million to $4.5 million. Gross profit for the service department dropped from $5.5 million to $4.7 million. Although income was stabilizing in 2009, there was no improvement until the latter part of the year. Clark explained that, notwithstanding a cessation of the decline in early 2009, the effect would not be immediately felt in service due to lag time. As noted above, new cars did not come in

for service until they had been driven 10,000 miles.

In early 2009, when walking through the service shop, Berryhill observed that people were standing around because there was no work. He determined that the service department was overstaffed. He spoke with Service Director Bullock and asked him to have the team leaders of each team give him two candidates for a reduction-in-force.

Berryhill regularly consulted with Clark. Following his conversation with Bullock, Berryhill met with Clark and, after "looking at the numbers, looking at the hours, again trying to remain more on the optimistic side" determined that four technicians should be eliminated. He noted that he "felt we needed more," and that would have been true if "a couple people [had] not quit."

The General Counsel argues that, insofar as technicians were only earning money when they were working, that the reduction-in-force did not result in any significant cost savings to the dealership. When asked about the absence of cost savings, Berryhill responded, "I wasn't at looking cost savings when I terminated four technicians. I was looking for the survival of the remaining technicians. That was my intent. It wasn't to save money. It was to save people."

In a more comprehensive answer, Berryhill explained that "when you are overstaffed, the people that are good that aren't making enough money, they are going to leave. They are going to find somewhere to work and make the money they deserve. So that's why you can't afford to have too many . . . technicians when they work on commission.

I find that the reduction-in-force in April 2009 was dictated by economic circumstances. As hereinafter found, the Respondents were obligated to bargain with the Union regarding both the decision and the effects of the decision to implement a reduction-in-force insofar as the Union had demonstrated its majority status on December 16 and had been certified as the collective-bargaining representative of the employees on February 11, 2009.

The complaint alleges that the employees discharged pursuant to the reduction-in-force were discharged because of their union activity in violation of Section 8(a)(3) of the Act.

The four employees discharged were, on April 2, 2009, Juan Cazorla, and on April 3, Tumeshwar (John) Persaud, David Poppo, and Larry Puzon. All signed union authorization cards and attended some union meetings, but only Cazorla and Poppo were shown to have engaged in any union activity after the election in December.

Cazorla was not publically outspoken regarding his union sympathies. He was invited to a union meeting by Alex Aviles and recalls attending about 10 meetings. Former team leader Andre Grobler had created an impression of surveillance of his union activity by referring to him hurrying to a meeting. In March 2009, Cazorla, accompanied by shop steward Dean Catalano, complained to acting Service Director Charles Miller that Cazorla's uniform shirts had been thrown into a trash can and a toilet.

John Persaud attended about five union meetings. When questioned, he indicated to both Davis and Berryhill that he supported the Company. Berryhill acknowledged that he expected Persaud to support the Company because he worked next to James Weiss.

Poppo, although having attended some union meetings, was not outspoken during the organizational campaign. He was elected a shop steward in February.

Puzon attended three union meetings. He was not outspoken regarding his union sympathies. Rex Strong, a unit employee until appointed as a team leader on December 9, attended one of those meeting. Alex Aviles, who Weiss identified as being one of the instigators of the organizational campaign, attended all three meetings at which Puzon was present.

Insofar as Aviles was an active participant in the organizational campaign for some period prior to his appointment as a team leader, I find that the Respondent had knowledge of the union activities of the four technicians laid off in April. As the Company points out in its brief, omitting Tony Roberts who had been discharged in December, outspoken prounion employee Meyer, who was appointed a shop steward and was present at the representation hearing, James Wasiejko, who served as a union observer at the election, Dean Catalano, who was appointed as a shop steward, and Ruben Santiago were not discharged.

Team Leader Alex Aviles confirmed that Service Director Bullock informed him in early February that he needed to start thinking about identifying two technicians on his team for layoff. Aviles "was hoping the request" would not be repeated, but it was. In early March, Bullock approached him again. A couple of days later, Aviles approached Bullock and stated that he was not happy, that somebody should not lose their job "just because they were on the red team or the green team or the gold team."

When the new team leaders were appointed, Makin was reassigned from the red team to the green team, Alex Aviles was assigned the red team, and Rex Strong was assigned the gold team. The issue raised by Aviles resulted in a management meeting in which it was agreed that all the technicians would be evaluated "against everybody across the shop and not per team." Aviles noted that he did not "want to brag about my techs, but I thought I had probably some of the best techs there" and that he did not want one of them to lose his job "just because he's [on the] red [team]."

Aviles and the other team leaders, Rex Strong and Bruce Makin put together an evaluation form upon which they agreed and submitted it to higher management for approval. At that point in time, Bullock was absent and Parts Director Charles Miller was serving as acting service director. MBO received input, an evaluation form that had been used in an AutoNation dealership in south Florida, from Bobbie Bonavia. Miller explained that MBO "kind of combined the two forms and came up with one of our own."

The team leaders did not know how many technicians would be laid off, but assumed the number would be six because Bullock had initially asked for two from each team. They did not know whether their evaluations would be the deciding fact but assumed their evaluations were "going to have a lot of weight."

On March 26, 2009, the three team leaders met together with acting Service Director Miller present as a facilitator. They

evaluated alignment technician Jorge Amaya, who was not subject to layoff because of his specialization. Upon reaching agreement regarding his ratings, they used his ratings as the benchmark for the technicians.

Each team leader in turn addressed the members of his team, receiving input from the other two team leaders. As Aviles explained, "all the three team leaders have been there for a very long time, so we pretty much know a lot about everybody." Each leader gave his opinion and got the opinions of the other two team leaders and decided upon how to score the various categories. Any disagreements were discussed, and agreement was reached. The rating form was then given to Miller who added the scores.

The team leaders had been instructed by higher management, including Davis, that consideration of a technician's union sympathies was not to play any part in the evaluation. Aviles credibly testified that they were "looking at who was going to be the best technician to leave on the floor. Just because they want the Union or not, that has nothing to do with it." He pointed out that he hoped "I never have to go through it again. These people were my friends. And I used to worry because I'm sure they are probably upset at me because they know I participated in this, but it's very hard to know that your friend may not have a job next week."

The four lowest rated technicians were Cazorla, Puzon, Poppo, and Persaud. All were discharged. Berryhill had determined, prior to receiving the results of the evaluations, that the four lowest rated would be laid off, i.e., discharged. Consistent with his testimony relating to accepting Bullock's recommendation regarding Roberts, he explained that he did not "work with them daily so I'm not the judge of their talent level, and that's why I had it done the way I did."

Upon learning of the discharge of the four technicians, James Wasiejko, who had served as an observer for the Union at the election, spoke with his team leader, Bruce Makin, and volunteered to take a layoff to let one of the discharged technicians remain, "because they had kids." Makin thereafter told him that he could not do anything about it. Wasiejko then spoke to Miller who said that he appreciated Wasiejko's offer, but the decision was made. Berryhill acknowledged that he was made aware of Wasiejko's offer but rejected it insofar as it would have disturbed "the integrity of the . . . process." He also noted that he was concerned that the offer may have been a "set up." Wasiejko acknowledged that there had been no retaliation against him and that Makin was fair in his evaluations of employees.

b. Analysis and concluding findings

In assessing the evidence under the analytical framework of *Wright Line*, supra, I find that each of the alleged discriminatees engaged in union activity, but that activity was minimal except for Poppo who was appointed a union steward. I also find animus. The discharges were adverse actions that affected the employment of each of the alleged discriminates. I find that the General Counsel has carried the burden of proving that union activity was a substantial and motivating factor for Respondents' action. Thus, the burden of going forward to establish that the same action would have been taken against them is upon the Respondents.

The issue herein is whether the selection of employees to be discharged pursuant to the reduction-in-force was discriminatory. The Respondents do not use seniority as a factor, as Berryhill told Roberts. Previous evaluations were not used as a factor in determining which alignment and tire technicians should be laid off.

Regarding previous evaluations, Aviles explained that he had not "evaluated any of them . . . I wanted it to be my judgment." He noted that the skill ratings of the technicians did not necessarily match their abilities, that they were "a thank you for your seniority time" but that they did not "really have that skill set." During the organizational campaign prounion employee Ruben Santiago had complained to Berryhill that Team Leader Oudit Manbahal showed favoritism. The demotions of Manbahal and Grobler confirm that the Respondents lacked confidence in them. Prior evaluations for members of their teams would have been made by Manbahal and Grobler.

I have credited the testimony of Aviles regarding the manner in which the Respondents decided to evaluate the technicians. Although Meyer, who was promoted to skill level A in August and is now the diagnostic technician for the green team, was rated in the bottom half of the technicians, that circumstantial evidence does not persuade me that the ratings were manipulated. Significantly, none of the technicians who openly supported the Union during the campaign, and none of the technicians who Weiss identified as being suspected of harassing him, were rated as one of the bottom six, the number of technicians that the team leaders expected to be affected. I am mindful that neither Makin nor Strong testified, and the absence of their testimony raises misgivings relative to the objectivity of the ratings, but there is no direct evidence that the ratings were manipulated because of an employee's union sentiments. When the team leaders disagreed, they discussed the rating and ultimately agreed upon it. Any misgiving that I have regarding a discriminatory motive in the evaluations are resolved by the credible testimony of Aviles that a technician's union sympathies played no part in his ratings and that he agreed upon the ratings given each technician.

An administrative law judge may not substitute his or her opinion regarding how a situation should have been handled in evaluating whether an employer's conduct was unlawfully motivated. *Ryder Distribution Resources*, 311 NLRB 814, 816 (1993). The Respondents established that a reduction-in-force was necessary. The Respondents discharged the four lowest rated technicians. There is no probative evidence that the ratings of the technicians were related to their union activities which, other than the status of Poppo as a shop steward, were minimal. Thus, I find that Cazorla, Puzon, Poppo, and Persaud would have been discharged even in the absence of their union activities. I shall recommend that this allegation be dismissed.

3. The constructive discharge of James Weiss

As my findings with regard to the 8(a)(1) allegations reflect, Weiss, at the outset of the union organizational campaign, pledged his support to the Company and thereafter provided information relating to the union sympathies of his fellow em-

ployees to the Company. He initiated an antiunion petition and solicited his fellow employees to sign it. There is no credible evidence that his actions were directed by the Company, and even if there were such evidence, there is no evidence that he refused any directive given to him. Weiss, during the organizational campaign or thereafter when employed, never complained or commented that any thing he did was motivated by anything other than his antiunion sentiment. He made no contemporaneous complaint of any threat, any coercion, or any solicitation to lie.

Weiss asserted that his working conditions changed, but acknowledged that he continued to perform maintenance on vehicles. He complained to Berryhill and Davis that he was being harassed, but the harassment of which he complained related to his fellow employees. Although claiming that he was often in Berryhill's office, there is no evidence that this occurred following the election, and there is no evidence that this was a change in working conditions for which MBO was responsible. There is no credible evidence that there was any change in the working conditions of Weiss or that the Company was responsible for any such nonexistent change.

Weiss sent a resignation letter to Berryhill, but that letter cites no threats and affirmatively states that "I have never said anything bad" about AutoNation or MBO and "I never will." Contrary to the foregoing representation, at the hearing herein, Weiss testified that he was threatened with discharge and blackballing by Davis, notwithstanding the fact that he never refused to do anything that Davis allegedly asked him to do. Following the election, when Weiss complained of harassment, Davis asked for specifics. Weiss gave none. Weiss claimed that he had heard false rumors regarding his being a drug addict but did not want to falsely accuse anyone. Although suspecting Dean Catalano, Brad Meyer, Ruben Santiago, and Manchung Wong, Weiss did not claim that he heard any rumors from them. Insofar as the Company was to investigate his complaints, it needed to know where to start. How did Weiss learn of the rumor? Davis requested Weiss to "put pen to paper" and state "[w]ho, what, when." Weiss never did so. Although asserting that he had taken pictures of his scratched car, Weiss never provided them to the Company.

In order to establish a constructive discharge, the General Counsel must establish that the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Then it must be shown that those burdens were imposed because of the employee's protected activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

The General Counsel's arguments relative to alleged pressures placed upon Weiss by the Respondents and its unresponsiveness to his alleged claims of harassment are dependent upon his credibility. Weiss was not credible. He claims that his denial to a Board agent that he was solicited to circulate the antiunion petition was a lie as well as his denial regarding whether he showed it to Davis. He claims to have untruthfully told Davis that he had sent the petition to the Union. Although claiming to have pictures relating to the damage to his car, he did not provide them to the Company. He never provided any specifics relating to alleged harassment. After sending his resignation letter, he spoke with Berryhill and remained as an employee for several days before finally quitting.

There is no evidence that the Respondents imposed any burdens upon Weiss or that the burdens, which were not imposed, related to union activity or antiunion activity. Weiss voluntarily quit and his quitting was unrelated to any imposition of burdens imposed by the Respondents. I shall recommend that this allegation be dismissed.

4. The documented coaching of Dean Catalano

Catalano was appointed as a shop steward in February 2009. In September 2009, he observed a fellow employee leaving the restroom without washing his hands. The incident was a subject of discussion among Catalano and other employees, and they were overheard by Sales Manager Maia Menendez. Fabian Santos, one of the technicians in the conversation, obtained the telephone number of the Orange County Health Department. Thereafter Menendez questioned Catalano regarding why the employee were talking about "bathroom stuff." Catalano explained what had occurred and gave her the telephone number.

Menendez contacted the Orange County Health Department and discussed concerns about "general hygiene, . . . sneezing into your elbow instead of sneezing into your hand, [and] washing your hands regularly." They also discussed concerns about the H1N1 virus and precautions to take to avoid contracting the virus.

On October 2, a representative from the Health Department came to the dealership and gave two identical presentations. Catalano attended the second presentation. The presentation concentrated upon the H1N1 virus. At the close of the presentation, the representative asked for questions. Catalano complained to the representative that she had not addressed the problem that had been raised in September, leaving the restroom without washing hands, and "that was my problem [a]nd your presentation didn't bring up anything [about] disease caused by people not . . . using proper cleanliness after using the bathroom." He stated that this was "not the meeting we were looking to have." The representative suggested that Catalano raise his concern with management. Catalano responded that he had and "this is what" he got.

On October 13, 2009, Catalano was issued a documented coaching reminding him that he needed to conduct himself "in a manner that is courteous, respectful and polite to all associates, managers, customers, and guests of the dealership." The coaching states that it will not be part of the employee's permanent record but will be retained in a local file by the service manager.

The General Counsel, citing *Atlantic Steel Co.*, 245 NLRB 814 (1979), argues that Catalano was not rude and that, even if he were, his conduct did not lose the protection of the Act. I would note that any speaker would consider statements indicating dissatisfaction with the speaker's presentation to be criticism. If the criticism of the presentation had been made to Menendez or some other management official who was aware of the concerted concern of employees relating to sanitary restroom habits, the considerations set out in *Atlantic Steel Co.* would have been applicable. The representative of the Health

Department was a public employee who was a guest of the dealership and who was unaware of the events that had prompted her invitation to give a presentation. Catalano, when speaking to the representative, did not assert that he was speaking as a shop steward. When Catalano informed her that her presentation was not what he had wanted and the representative suggested that he speak to management, Catalano responded that he had done so and "this is what" he got. The foregoing response was neither courteous, polite, nor protected. I shall recommend that this allegation be dismissed.

F. The 8(a)(5) Allegations

As already set out in the procedural history herein, the Respondents are challenging the certification of the Union. Consistent with that position, it admits that it has refused to bargain. All alleged 8(a)(5) violations are dependent upon enforcement of the Board Order in *Mercedes-Benz of Orlando*, 355 NLRB No. 113 (2010).

The Respondents argue that, even assuming enforcement of the current Board Order, any obligation to bargain should commence as of the amended certification date, August 23, 2010, because the "unique facts of this case are completely unprecedented, placing the parties in uncharted territory." I disagree. The Respondents, represented by experienced labor relations counsel, were fully aware that an employer's "obligation to bargain before making changes commences not on the date of certification, but on the date of the election." *Mike O'Connor Chevrolet*, 209 NLRB 701, 704 (1974); *Ramada Plaza Hotel*, 341 NLRB.310, 315–316 (2004). When shop steward Brad Meyer questioned Team Leader Alex Aviles about why skill level reviews were not being done, Aviles answered that the MBO was concerned about maintaining the status quo. On June 23, 2010, when the Supreme Court held that decisions by the two-member Board were void in *New Process Steel, L.P. v. NLRB*, supra, no unique circumstances were created. The situation was similar to those situations in which a Court of Appeals has remanded a test of certification case to the Board. In *Indiana Hospital*, 315 NLRB 647 (1994), the union won a representation election in 1991. A Court of Appeals, in 1993, remanded the employer's test of certification case to the Board. The administrative law judge's decision was issued while the test of certification proceeding was pending. Id at 648 fn. 3. The Board affirmed the decision of judge the who held that an employer acts "at its peril" when making unilateral changes once the union has demonstrated majority status. Id. at 655.

The Respondents argue that the Board's amending the certification date expressed its "manifest intent to toll MBO's bargaining obligation up to that point in time." I again disagree. If the Board had such a "manifest intent" it would have said so. Footnote 4 notes that the amendment of the certification date was made "to the extent it may be relevant in future proceedings." That Board decision issued on August 23, 2010. This proceeding was already pending insofar as the initial complaint, which included 8(a)(5) allegations, issued on March 31, 2010. This was a pending proceeding, not a future proceeding.

The Respondents, notwithstanding the foregoing arguments, put forth separate defenses relating to the alleged unilateral changes.

1. The layoffs/discharges in April 2009

It has long been established "with few limited exceptions, that layoffs are a mandatory subject of bargaining." *Winchell Co.*, 315 NLRB 526, 530 (1994). See also *Holmes & Narver*, 309 NLRB 146 (1992).

The decision of the Company to reduce its work force in April 2009, would have resulted in layoffs except for the Company policy to discharge rather than lay off.

I have found that the layoff/discharges did not violate Section 8(a)(3) of the Act. Notwithstanding that finding, layoffs are a mandatory subject of bargaining. The Company did not either notify or bargain with the Union regarding the layoffs.

The Respondents argue that the "compelling economic circumstances" exception to the obligation to bargain is applicable. That argument has no merit. "[I]t is well settled that a drop in business does not rise to the level of an economic exigency or compelling economic circumstances." *Uniserv*, 351 NLRB 1361, 1369 (2007). A compelling economic circumstance justifying a refusal to bargain with regard to the decision to lay off employees and the effects thereof must be "an unforeseen occurrence having a major economic effect . . . that requires the company to take immediate action." *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). There was noting unforeseen herein. The Company had experienced declining sales and reduced income in its fixed operation for several months. The diminished sales and income continued. In February, Service Director Bullock had informed the team leaders that they should be thinking about identifying two members of their respective teams for separation. He repeated that in March. Thereafter, pursuant to discussions fostered by Team Leader Aviles, an alternate method of selection was developed. This was not an unforeseen occurrence. The Respondents were obligated to bargain with the Union with regard to the layoff decisions and the effects thereof. The Respondents, by unilaterally laying off Cazorla, Puzon, Poppo, and Persaud, violated Section 8(a)(5) of the Act.

2. Skill level reviews

The complaint alleges that on or about January 23, 2009, and May 22, 2009, Alex Aviles told employees that MBO had not conducted employee skill level reviews because of the Union. The complaint further alleges that the Company suspended skill level reviews in January 2009 and reinstated them in August 2009 for employees on the red team and in October for employees on the green and gold teams.

In a memorandum dated September 18, 2007, Service Director Art Bullock informed the technicians that skill reviews for technicians would be performed "twice annually," in January and February and June and July. Bullock, in the memorandum, apologized for delay in "completing the mid year review in a timely fashion" and notes that the January and February and June and July schedule would "eliminate that happening in the future."

Skill level reviews could result in a technician receiving a pay increase or a promotion to a higher skill level which would automatically result in a pay increase. It is undisputed that, at the relevant times herein, AutoNation had implemented a wage

freeze; however, Berryhill admitted that raises as a result of a promotion were not affected by the freeze.

Berryhill, when examined as an adverse witness pursuant to Rule 611(c) of the Federal Rules of Evidence, admitted that skill level reviews were suspended and not resumed until the late summer of 2009. Contrary to that testimony, technician Brad Meyer acknowledged that he received a review, but no promotion, in May 2009. Thereafter, in August 2009, he received another review and a promotion.

Meyer heard rumors that the skill level reviews were suspended in January 2009. He spoke with his new team leader, Alex Aviles, who confirmed, as Meyer recalled, that "because of the pending union negotiations and the status quo . . . we won't be performing the skill level reviews . . . [because] the skill level review is tied to your pay." Meyer and Aviles had a similar conversation in May when Meyer's skill level review was conducted. On that occasion, after having received a favorable evaluation, Meyer asked about being promoted from skill level B+ to A. Aviles stated that "because of the status quo and the pending negotiations, they couldn't do anything with that . . . since it was tied to our pay." Meyer replied, "[T]hat's not correct. . . . [I]f it was something you were doing before, you should be doing it now." Aviles said that was what "management told him."

Notwithstanding the September 2007 policy memorandum from Bullock, both Meyer and Aviles agree that skill level reviews had not always been conducted in a timely manner. Aviles recalled that, when the reviews were not conducted in January, he informed the team that he had been told that the reviews had been suspended because "with the status quo, we didn't know if promoting somebody was violating that or not, so we had to wait until we got clarification on that. . . . [W]e didn't want to violate the status quo; we wanted to make sure we were doing the right thing." Aviles did not address his conversation with Meyer in May. Aviles recalled that five technicians were promoted when word came down that promotions could be granted.

The complaint alleges that the explanation given by Aviles informed employees that skill level reviews were not given because of the Union. Aviles and Meyer agree that the explanation related to maintaining the status quo. I shall recommend that the independent 8(a)(1) allegation related to the explanation given by Aviles be dismissed.

The Respondents argue that, due to the wage freeze, there was no "possible purpose" that skill level reviews could serve, but then acknowledge that they were resumed "as a testament to management's obvious concern for the technicians group." The foregoing does not explain why they were resumed in the absence of any "possible purpose."

There was a purpose to skill reviews even if the review did not result in a wage increase. Although wage increases were dependent upon the reviews, so were promotions. Promotions were not affected by the wage freeze. A skill level review would also put an employee on notice that he had deficiencies. Insofar as an employee was not "on track" with regard to his skills, notice of that fact and remedial action by the employee might well exempt that technician from consideration for layoff/discharge if a further reduction-in-force were to occur.

Berryhill thought that skill level reviews resumed in the summer of 2009, but his testimony in that regard was unclear. Insofar as Meyer received a skill level review in May, it would appear that reviews for members of the red team resumed in May. It is undisputed that reviews were resumed for all teams; thus the only issue is whether promotions were denied as a result of the suspension. Aviles testified that five technicians were promoted once the dealership received word that promotions could be granted. It is clear in the case of Meyer that his promotion to an A technician was delayed until August 2009. The record does not establish the identity of the four technicians other than Meyer who received promotions or when the evaluations upon which their promotions were predicated occurred. They also should be made whole if, at the compliance stage of this proceeding, it can be shown that the absence of a skill level review in the first part of 2009 delayed their promotions. See *United Rentals*, 349 NLRB 853, 864 (2007).

The Respondents, by unilaterally suspending skill level reviews and thereby denying promotions to employees who would have been promoted if those reviews had occurred, violated Section 8(a)(5) of the Act.

3. Prepaid maintenance services

Prior to 2005 or 2006, Mercedes-Benz covered all maintenance during the warranty period of the vehicle. After the vehicle had been driven 10,000 miles, the Flex A service was performed. Thereafter, after the next 10,000 miles, the more comprehensive Flex B service was performed. Thereafter the services continued to be alternated after every 10,000 to 12,000 miles. When Mercedes-Benz ceased providing free maintenance, AutoNation began offering a prepaid maintenance package to purchasers of vehicles.

The technicians were formally paid for 1.2 hours when performing standard Flex A maintenance and 4.2 hours for performing Flex B maintenance, which included changing the brake fluid. The specified hourly payment was automatic. If the work was accomplished in a shorter time, it was to the technician's advantage. If took longer than the allotted time, the technician was still paid only for the specified time.

In January 2009, Aviles told Meyer that the Company was looking at changing the AutoNation service "because the dealership was only getting paid X amount of dollars from the corporate parent and that the dealership didn't want to continue to absorb that loss." On February 1, 2009, Aviles distributed a document reflecting a reduction from 1.2 hours to 1.1 hours for Flex A service and from 4.2 to 2.3 hours for Flex B service.

Service Sales Manager Menendez explained that the finance department informed MBO that the items required under the AutoNation maintenance program were "not the same as the items required by Mercedes-Benz." When MBO discovered, after a few years, that it was "doing the maintenance service according to the Mercedes-Benz standards, which is far beyond what we were actually getting reimbursed for," it adjusted the times for which the technicians were paid.

Menendez did not specify any services provided under

the AutoNation prepaid maintenance package with its customers that could be eliminated, nor did she identify any services formerly performed that were eliminated. Menendez admitted that the adjustment in times lowered the earnings of the technicians when they were performing prepaid maintenance work.

Changes directly affecting employees' earnings are mandatory subjects of bargaining. The Respondents, by unilaterally reducing the specified hours for performing prepaid maintenance work, violated Section 8(a)(5) of the Act.

4. Payment for damages

On February 18, 2010, employee Dean Catalano recalls that Team Leader Brue Makin handed a document to the members of his team which announced a change in policy insofar as employees would be charged for damage to vehicles, 25 percent of the cost for a first instance, 50 percent for a second instance, and 100 per cent for a third instance. So far as the record shows, the foregoing change was announced only to members of Makin's team. There is no evidence that the foregoing policy was ever enforced. Berryhill credibly testified that employees have never been charged for damage they caused. Technicians repair the damage on their own time, but the cost of any parts are absorbed by the Company. He recalled learning that Makin had posted a notice and "I immediately said . . . take that down." The General Counsel presented no evidence that any employee ever had to pay for damage. The General Counsel did not establish that there was a change in policy relating to damage to vehicles. I shall recommend that this allegation be dismissed.

5. The information request

The Respondents, in their brief, do not address the information request of the Union. On April 17, 2009, the Union, following its certification, requested information relating to classifications, wage rates, and related information of bargaining unit employers and benefits provided to them. The Company, by letter dated June 4, 2009, refused to provide the information pending determination of its test of certification. The Union repeated its information request on September 3, 2009, and the Company again, consistent with its testing of certification, refused to provide the requested information.

Information relating to bargaining unit employees is presumptively relevant. Refusal to provide such information, notwithstanding an employer's testing of certification, does not excuse a failure to provide that information. *United Cerebral Palsy of New York City*, 343 NLRB 1 (2004). The Respondents, by failing and refusing to provide the Union with requested relevant information regarding unit employees as requested in its letter of April 17, 2009, violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondents, by maintaining an unlawfully broad rule prohibiting all solicitation on company property, by creating the impression that employees' union activities were under surveillance, by coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies, by soliciting employee grievances and implying that they would be remedied in order to dissuade them from supporting the Union, by informing employees that their grievances with regard to team leaders had been adjusted by the demotion of the team leaders in order to dissuade them from supporting the Union, and by informing employees that the Respondents would not recognize the Union until there was a contract, violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. The Respondents, by discharging Anthony Roberts because of his union activities, violated Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondents, by unilaterally laying off Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud, by unilaterally suspending skill level reviews and thereby denying promotions to employees who would have been promoted if those reviews had occurred, by unilaterally reducing the specified hours for performing prepaid maintenance work, and by failing and refusing to provide the Union with requested relevant information regarding unit employees as set out in its letter of April 17, 2009, violated Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents must rescind the unlawfully broad rule prohibiting all solicitation on company property.[3]

The Respondents, having unlawfully discharged Anthony Roberts, must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from December 8, 2008, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondents, having unlawfully laid off Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud without notice to or bargaining with the Union regarding the decision to lay off employees or the effects of that decision, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from April 3, 2008, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondents, having unilaterally suspended skill level reviews thereby denying promotions, it must make whole all employees who would have been promoted if those reviews had

[3] Counsel for the General Counsel requests that I impose a "nationwide remedy" with regard to the overly broad rule in the AutoNation Associate Handbook. My recommended order directs recession of that rule.

occurred.

The Respondents, having unilaterally reduced the specified hours for performing prepaid maintenance work, must restore the former hours specified for that work and make whole all employees for any loss of earnings caused by the unilateral reduction.

The Respondents must provide the Union with the requested relevant information regarding unit employees as set out in its letter of April 17, 2009.

The Respondent will also be ordered to post and email an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Inc., Maitland, Florida, its officers, agents, successors, and assigns, and AutoNation, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining an unlawfully broad rule prohibiting all solicitation on company property.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies.

(d) Soliciting employee grievances and implying that they will be remedied in order to dissuade them from supporting the Union.

(e) Informing employees that their grievances have been adjusted by the demotion of team leaders in order to dissuade them from supporting the Union.

(f) Informing employees that the Respondents will not recognize the Union until there is a contract.

(g) Discharging employees because of their union activities.

(h) Laying off service technicians in the bargaining unit represented by the International Association of Machinists and Aerospace Workers, AFL–CIO, without giving notice to and bargaining with the Union regarding the decision to lay off and the effects of that decision.

(i) Unilaterally suspending skill level reviews thereby denying promotions to employees who would have been promoted if those reviews had occurred.

(j) Unilaterally reducing the specified hours for performing prepaid maintenance work.

(k) Failing and refusing to provide the Union with requested relevant information.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawfully broad rule prohibiting all solicitation on company property.

(b) Within 14 days from the date of this Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from our files any reference to the discharge of Anthony Roberts, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of this Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the decision.

(g) Make whole all employees who would have been promoted for any loss of earnings suffered as a result of the suspension of skill level reviews.

(h) Restore the former hours specified for prepaid maintenance work and make whole all employees for any loss of earnings caused by the unilateral reduction in specified hours.

(i) Provide the Union with the requested relevant information regarding unit employees as set out in its letter of April 17, 2009.

(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(k) Within 14 days after service by the Region, post at its facilities in Maitland, Florida, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 25, 2008.

(l) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 18, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT maintain a rule prohibiting all solicitation on company property.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT coercively interrogate you regarding your knowledge of employee union activity, your union activities, and your union sympathies.

WE WILL NOT solicit your grievances and imply that they will be remedied in order to dissuade you from supporting the Union, and WE WILL NOT adjust your grievances in order to dissuade you from supporting the Union.

WE WILL NOT tell you that we will not recognize the Union until there is a contract.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT lay off unit employees without notice to and bargaining with International Association of Machinists and Aerospace Workers, AFL–CIO, regarding the decision to lay off service technicians in the unit represented by the Union and the effects of that decision.

WE WILL NOT unilaterally suspend skill level reviews.

WE WILL NOT unilaterally reduce the specified hours for performing prepaid maintenance work.

WE WILL NOT fail and refuse to provide the Union with requested relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind our unlawfully broad rule prohibiting all solicitation on company property.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Anthony Roberts, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the decision.

WE WILL make whole all of you who would have been promoted for any loss of earnings suffered as a result of the suspension of skill level reviews.

WE WILL restore the former hours specified for prepaid maintenance work and make all of you whole for any loss of earnings caused by the unilateral reduction in specified hours.

WE WILL provide the Union with the requested relevant information regarding unit employees as set out in its letter of April 17, 2009.

CONTEMPORARY CARS, INC. D/B/A MERCEDES-BEN Z OF ORLANDO, INC., AND AUTONATION, INC., SINGLE AND JOINT EMPLOYERS

Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando and Autonation, Inc., single and joint employers *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 12–CA–026126, 12–CA–026233, 12–CA–026306, 12–CA–026354, 12–CA–026386, and 12–CA–026552

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On September 28, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 358 NLRB No. 163, and on December 7, 2012, the Board issued an unpublished Order Denying Motion for Reconsideration. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Seventh Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order and the Order Denying Motion for Reconsideration, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered *de novo* the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order and Order Denying Motion for Reconsideration, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 358 NLRB No. 163, and the Order Denying Motion for Reconsideration, which are incorporated herein by reference. The judge's recommended Order, as further modified herein, is set forth in full below.[1]

ORDER

The National Labor Relations Board orders that the Respondents, Contemporary Cars, Inc. d/b/a Mercedes-Benz of Orlando, Maitland, Florida, its officers, agents, successors, and assigns, and AutoNation, Inc., Fort Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an unlawfully broad rule in their employee handbook prohibiting all solicitation on company property.

(b) Creating the impression that employees' union activities are under surveillance.

(c) Coercively interrogating employees regarding their knowledge of employee union activity, their union activities, and their union sympathies.

(d) Soliciting employee grievances and implying that they will be remedied in order to dissuade employees from supporting the International Association of Machinists and Aerospace Workers, AFL–CIO.

(e) Informing employees that their grievances with regard to team leaders have been adjusted by the demotion of team leaders in order to dissuade them from supporting the Union.

(f) Informing employees that the Respondents will not recognize the Union until there is a contract.

(g) Issuing employees documented coachings because of their protected concerted activities.

[1] We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall also substitute a new notice to conform to the modified Order and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

Member Johnson finds it unnecessary to pass on whether the Respondents, through Vice President and Assistant General Counsel Brian Davis, and General Manager Bob Berryhill, violated Sec. 8(a)(1) by interrogating employees regarding their union activities. In his view, those findings are cumulative and do not affect the remedy. Further, for the reasons set forth in the judge's decision, Member Johnson would adopt the judge's dismissal of the allegation that the Respondents violated Sec. 8(a)(3) by laying off service technicians Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud in April 2009. Finally, Member Johnson agrees with his colleagues that, under *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974), the Respondent unlawfully failed to bargain over the layoffs of the service technicians, among other postelection unilateral changes. He notes that the Respondent does not ask the Board to reconsider this precedent. Accordingly, although Member Johnson expresses no view as to whether *Mike O'Connor Chevrolet* was correctly decided, he agrees to apply it here for institutional reasons.

(h) Discharging employees because of their union activities.

(i) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain; specifically,

(i) Laying off service technicians in the bargaining unit represented by the Union without giving notice to and bargaining with the Union regarding the decision to lay off and the effects of that decision.

(ii) Unilaterally suspending skill level reviews, thereby denying promotions to employees who would have been promoted if those reviews had occurred.

(iii) Unilaterally reducing the specified hours for performing prepaid maintenance work.

(j) Refusing to bargain collectively with the Union by failing and refusing to provide the Union with requested relevant information.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawfully broad rule in their employee handbook prohibiting all solicitation on company property.

(b) Notify all employees who received the employee handbook that existed in July 2008 that the no-solicitation rule has been rescinded and will no longer be enforced.

(c) Remove from their files any reference to the documented coaching issued to Dean Catalano on October 13, 2009, and notify him in writing that this has been done and that the coaching will not be used against him in any way.

(d) Within 14 days from the date of this Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from their files any reference to the discharge of Anthony Roberts, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(g) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time Mercedes-Benz service technicians employed by Respondent MBO at its facility at 810 North Orlando Avenue, Maitland, Florida, excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

(h) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented in 2009 as set forth in paragraphs (i) through (l) below.

(i) Within 14 days from the date of this Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(j) Make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, in the manner set forth in the remedy section of the judge's decision.

(k) Make whole all employees who would have been promoted for any loss of earnings suffered as a result of the suspension of skill level reviews.

(l) Restore the former hours specified for prepaid maintenance work and make whole all employees for any loss of earnings caused by the unilateral reduction in specified hours.

(m) Compensate Anthony Roberts, Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud, and those employees who suffered a loss of earnings due to the Respondent's suspension of skill level reviews and reduction in hours for prepaid maintenance work, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(n) Provide the Union with the requested relevan information regarding unit employees as set out in its letter of April 17, 2009.

(o) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(p) Within 14 days after service by the Region, post at their facility in Maitland, Florida copies of the attached notice marked "Appendix A" and within that same time period post at all of AutoNation's other facilities, nationwide, copies of the attached notice marked "Appendix B."[2] Copies of the notices, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, copies of the notices to all current employees and former employees employed by the Respondents at any time since July 25, 2008.

(q) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. December 16, 2014

Mark Gaston Pearce,	Chairman
Harry I. Johnson, III,	Member
Nancy Schiffer,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawfully broad rule in our employee handbook that prohibits all solicitation on company property.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT coercively interrogate you regarding your knowledge of employee union activity, your union activities, and your union sympathies.

WE WILL NOT solicit your grievances and imply that they will be remedied in order to dissuade you from supporting the International Association of Machinists and Aerospace Workers, AFL–CIO, and WE WILL NOT adjust your grievances in order to dissuade you from supporting the Union.

WE WILL NOT tell you that we will not recognize the Union until there is a contract.

WE WILL NOT issue you a documented coaching because of your protected concerted activities.

WE WILL NOT discharge you because of your union activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain. Specifically, WE WILL NOT

(1) Lay off service technicians in the bargaining unit represented by the Union without giving notice to and bargaining with the Union regarding the decision to lay off and the effects of that decision.

(2) Unilaterally suspend skill level reviews, thereby denying promotions to employees who would have been promoted if those reviews had occurred.

(3) Unilaterally reduce the specified hours for performing prepaid maintenance work.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawfully broad rule in our employee handbook prohibiting all solicitation on company property and WE WILL notify all employees who received the handbook that existed in July 2008 that this rule has been rescinded and will no longer be enforced.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the documented coaching issued to Dean Catalano on October 13, 2009, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the coaching will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Anthony Roberts full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Anthony Roberts whole for any loss of earnings and other benefits suffered as a result of his discharge, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of Anthony Roberts, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time Mercedes-Benz service technicians employed by MBO at our facility at 810 North Orlando Avenue, Maitland, Florida, excluding all other employees, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented in 2009, as set forth below.

WE WILL, within 14 days from the date of the Board's Order, offer Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud whole for any loss of earnings and other benefits suffered as a result of their discharges, with interest.

WE WILL make whole all of you who would have been promoted for any loss of earnings suffered as a result of the unilateral suspension of skill level reviews.

WE WILL restore the former hours specified for prepaid maintenance work and make all of you whole for any loss of earnings caused by the unilateral reduction in specified hours.

WE WILL compensate Anthony Roberts, Juan Cazorla, Larry Puzon, David Poppo, and Tumeshwar Persaud, and all of you who suffered a loss of earnings due to our suspension of skill level reviews and our reduction in hours for prepaid maintenance work, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each affected employee.

WE WILL furnish to the Union in a timely manner the information requested by the Union in its letter of April 17, 2009.

CONTEMPORARY CARS, INC. D/B/A MERCEDES-BENZ OF ORLANDO AND AUTONATION, INC., A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/12-CA-26126 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an unlawfully broad rule in our employee handbook that prohibits all solicitation on company property.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawfully broad rule in our employee handbook prohibiting all solicitation on company property and WE WILL notify all employees who received the handbook that existed in July 2008 that this rule has been rescinded and will no longer be enforced.

AUTONATION, INC.

The Board's decision can be found at www.nlrb.gov/case/12-CA-026126 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.